

THE CAMBRIDGE LAW JOURNAL

NOVEMBER, 1956

CASE AND COMMENT

PROCEDURE—EVIDENCE EXCLUDED BY STATE INTEREST

THE subject of Crown privilege for documents and oral evidence has been considered on more than one occasion in this Journal in recent years. In particular J. E. S. Simon's article on *Evidence Excluded by Considerations of State Interest* was a prominent feature of the last volume [1955] C.L.J. 52. Still more recent developments call for further comment. In June 1956 the Lord Chancellor made in the House of Lords a statement of policy in relation to future claims of Crown privilege for documents and oral evidence: H. L. Debates, Vol. 197, cols. 741-747. A few months earlier, in December, 1955, the House of Lords decided that the law of Scotland is rather more favourable to the private litigant than the law of England: *Glasgow Corporation v. Central Land Board*, 1956 S.L.T. 41. At the time of writing (August, 1956), this case has not been reported south of the border, though it has been referred to in legal periodicals, especially by Professor T. B. Smith in (1956) 19 M.L.R. 427 and Sir Carleton Allen in (1956) 72 L.Q.R. 332.

Before discussing the concessions which the Lord Chancellor announced on behalf of the Government it is necessary to ask what is the exact effect of a statement of policy of this character. It is not, of course, binding on the courts, and, lawyers, therefore, will criticise the value of the concessions made. It is indeed a mere statement of the practice which the Government Departments have been instructed to follow in the future. The question, therefore, arises as to how in the event of a claim to privilege which conflicts with the instructions being made by any Department a litigant could obtain redress. Clearly it cannot be in the English courts, though it would, of course, be open to him to have the matter raised in Parliament. On the other hand, as *Glasgow Corporation v.*

Central Land Board shows, a litigant in Scotland can ask the court to overrule the claim of privilege, though the occasions of such intervention by the court have hitherto been very few. But the value of the concessions does not entirely depend upon their being strictly enforceable in a court of law. What matters to the litigant is that the Department should follow the rulings of the Government. A statement of this character may, it is suggested, be compared with the Treasury circulars which from time to time lay down instructions to the Departments. These are documents which do not receive the publicity which is attached to a ministerial pronouncement in Parliament and they are not normally even published. Nevertheless, the instructions are followed by the Departments. Here then are concessions where no question of legislation, even by amendment of the Rules of the Supreme Court, arises since no change in the law is in contemplation. Yet the statement promised action which without changing the substantive rule introduces a procedure which is more favourable to the subject; it is in effect legislation without sanction for disregard. The Lord Chancellor undertook to consider putting the statement of policy in a form which would be readily available to members of the legal profession. Once this has been done, it is difficult to see how a Department could escape censure from a judge, if its practice departed from the policy outlined in the parliamentary announcement. But this may be of little avail to a litigant who has in effect been denied access to documents which are relevant to his case.

Turning to the statement itself, the Lord Chancellor recognised that the problem had become pressing on account of the liability in tort of the Crown which was imposed by the Crown Proceedings Act, 1947. He then referred to *Duncan v. Cammell Laird & Co., Ltd.* [1942] A.C. 624, as settling the law of England. This case enabled Crown privilege to be claimed for a document on two alternative grounds: namely, that the disclosure of the contents would injure the public interest, *e.g.*, by endangering public security or prejudicing diplomatic relations; and secondly, that the document falls within a class which the public interest requires to be withheld from production. While acknowledging that in Scotland the court had an inherent power to override a Minister's claim, the Lord Chancellor expressed the view that the position in that country, though substantially different in principle (see below), might not be very different in practice. The concessions which were announced related to the second ground and claimed to strike a balance between the needs of litigants and those of Government administration, *i.e.*, between private interests and the proper functioning of the public service.

A very large part of the litigation arising out of the Crown Proceedings Act is due to road and other accidents to Government employees, or on Government premises. The Crown will not in future claim privilege for documents which are reports of the employees involved in accidents or of other eye-witnesses, or subsequent reports made by officials into the condition of vehicles, machinery or premises relevant to the accident. On the other hand, privilege will still be claimed where a Government inspector has been ordered to investigate an accident at a mine or factory; *i.e.*, in cases where the Department is not concerned as employer or owner of property but as the Government agency for investigating the incident.

Another class of documents for which discovery is often sought concerns medical reports and records. It was such a report which drew judicial criticism in the case of *Ellis v. Home Office* [1953] 2 Q.B. 135: see [1954] C.L.J. 11. The Crown is now prepared to disclose the ordinary medical records in respect of the health of civilian employees. This concession is not extended to medical reports and records in the Armed Services, on the ground that the relationship between doctor and patient is different from that in civil life since service doctors owe a special duty to commanding officers and the patient is denied a choice of doctor. Similar considerations apply to prison doctors. Unless therefore the Crown, or a doctor employed by the Crown, is being sued for negligence, the privilege will still be claimed for service and prison medical records, but where the doctor is being sued for negligence the Crown will not make the claim. Medical documents which are relevant to the defence in criminal proceedings will in future be made available in all cases and not limited as at present to certain documents which are made available in the case of more serious crimes.

In cases of contract there has been, in the opinion of the Government, little difficulty in the past because the documents passing between the parties are the most relevant and these are always disclosed, as are other documents which affect the legal position, such as an authority given to an agent. Where a report deals with a matter of fact as distinct from comment and advice and is relevant to the issue in Government contract cases a report will in future be excluded from the privileged class "where a distinction can be clearly drawn." Finally, the statement holds out the possibility of evolving new categories of documents of a factual nature which, without prejudice to the public interest, can also be excluded.

In the light of recent cases the statement of policy meets the grievances of the private litigant, except that of the wife in *Broome*

v. *Broome* [1955] P. 190, where privilege was claimed for the report of an army welfare worker relevant to a divorce case. In this type of case the Government are not prepared to waive privilege because the reconciliation work of welfare officers, especially when men are serving abroad, is regarded as of the highest importance. Upon this the comment may be made that the privilege is justified in such circumstances less on account of its importance to the Services than upon the ground that the work of effecting reconciliation between married couples in any walk of life might be gravely impeded: see, e.g., *Henley v. Henley* [1955] P. 202.

The Lord Chancellor's statement goes on to deal with departmental minutes and memoranda, and other documents by which the administrative machine thinks and works. Here the issue is admittedly the efficiency of public administration. It will be no surprise to anyone who has had experience of administration to learn that the Government are not prepared to waive privilege where that waiver might involve disclosing the opinions expressed by individual public servants in advance of a decision being reached by the Government. There is a class of minutes in this category which is relevant to proceedings in the courts brought by individuals. Where, for example, a Minister is attacked in Parliament or the press about an alleged wrongful imprisonment or malicious prosecution, he no doubt is advised by his civil servants as to what reply he should give to the attack. Such advice will not be made subject to discovery in any subsequent legal proceedings. This is a consequence of the orthodox view of the doctrine of ministerial responsibility, and shows, it may be suggested, the essential difference between a Government Department and a large business concern.

With regard to oral evidence the Lord Chancellor's statement is clear. Where privilege will continue to be claimed for written communications of relevance, oral communication will also be excluded. In practice, although it happened in *Broome v. Broome*, the issue of privilege seldom arises in relation to oral communications.

Glasgow Corporation v. Central Land Board, above, not only shows that the law of Scotland may be more favourable to the subject than the law of England, but also throws new light upon what is the extent of the "public interest." The Corporation were seeking to establish that the Central Land Board, which by statute acts by and on behalf of the Crown, should disclose certain documents in litigation which challenged the *vires* of the Board's method of assessing development charges. The documents included (*inter*

alia) letters and minutes passing between the Board and District Valuers which related to the methods whereby such charges should be calculated and determined; in other words they were inter-departmental communications, and accordingly the Secretary of State for Scotland had certified that they ought not to be produced because they belonged to a class of document which it was necessary to withhold for the proper functioning of the public service. The Courts in Edinburgh, with one dissentient in the First Division on Appeal, held that they were precluded by the decision of the House of Lords in the English case of *Duncan v. Cammell Laird & Co., Ltd.* (above) from questioning the ruling by the Minister. On appeal to the Lords, the House, consisting of five Law Lords including two from Scotland, were unanimously of opinion, to quote Lord Radcliffe, that "The power reserved to the court is the power to order production, even though the public interest is to some extent affected prejudicially . . . The interests of Government for which the Minister should speak with full authority do not exhaust the public interest . . . It is open to the court to dispute with the Minister whether his view . . . is well founded." There may, in other words, be wider considerations of public policy which are incidental to the administration of justice. This view was mentioned by Morris L.J. in *Ellis v. Home Office* [1953] 2 Q.B. at 147. Of such considerations in Scotland the court may be the judge and may thus overrule the Minister. In the present case it exercised its discretion by upholding the Minister. In passing it is of interest that the speeches showed that in *Duncan v. Cammell Laird & Co. Ltd.* the House was under the impression that the law of England and the law of Scotland were the same on account of the introduction in argument of *Earl of Home v. Vass* (1822) 1 Shaw's App. 229. Lord Keith of Avonholm has, however, now shown that there is a line of Scottish cases in which that case was not followed.

There is no doubt that the Lord Chancellor's statement of policy applies to Departments concerned with the government of Scotland. His admission that the law of Scotland differs in principle is on record. If the Government is prepared to leave the courts north of the Tweed with power to overrule ministerial claims to privilege it is difficult to see why the English courts should not be given the same powers. Perhaps the answer lies in the objections to any such concession which may be felt by those major Departments, such as the Service Departments, which have no separate Scottish counterpart.

E. C. S. WADE.

CONFLICT OF LAWS—CONTRACT—LAW GOVERNING DISCHARGE—
CONFISCATORY LEGISLATION—LEGISLATION CONTRARY TO
INTERNATIONAL LAW—PUBLIC POLICY

Re Helbert Wagg & Co., Ltd. [1956] Ch. 323 raises a number of questions of private and public international law.

The facts were simple. In 1924 an English banking corporation granted a loan of English pounds sterling to a German corporation. The principal and interest were payable in London in sterling. The loan, which was secured by a mortgage on property in Germany, was to be redeemed in instalments beginning in 1925 and ending in 1945. The loan agreement was to be construed according to German law, and in the event of any conflict, the English text was to prevail. The German debtor fulfilled his obligations under the agreement until July 1933, when a German moratorium law required him to make payments to the *Konversionskasse*, a German institution. Such payments were to operate as a full discharge of the debtor, while the *Konversionskasse* assumed the debtor's liabilities towards the foreign creditor. Accordingly the German debtor paid the remaining instalments to the *Konversionskasse*. The English creditor now claimed to participate in the distribution of German assets in England under the Distribution of German Enemy Property Act, 1949, on the ground that the debtor had not discharged his obligation. He contended that the German moratorium law did not apply, that even if it applied in principle, it was confiscatory or contrary to the law of nations and therefore ineffective in English courts, and that the contract had been abrogated in consequence of the outbreak of war.

In order to exclude German law the creditor contended that English law applied as the *lex situs* of the debt. This argument may seem surprising at first sight, but the creditor was compelled to adopt it for two reasons. In the first place, there were strong indications that the proper law of the contract was German and that only the *lex loci solutionis* was English. It is, however, well established now that the *lex loci solutionis* determines only the mode or method of performance and that all questions of substance are governed by the proper law.

In the second place, the creditor's case was based upon the confiscatory character of the German moratorium legislation. It is recognised by a constant practice that all measures of liquidation, both as regards movables and choses in action, are determined by the *lex situs*. However, as Upjohn J. was able to show, the *lex situs* of a debt is not identical with the law of the place where it is

payable, unless the debtor has a residence, though not necessarily his only residence, there. In the present case it was German.

If the confiscatory character of the German legislation had been obvious, it would have sufficed to refer to German law as the *lex situs* and to consider next whether this legislation was nevertheless inapplicable in England owing to its character. Instead, Upjohn J. followed another way of reasoning. Having found that the proper law of the contract was German, he held that it also determined whether the contract had been discharged. This is in accordance with a series of English and Australian authorities. This led back to the question whether the application of German law was excluded owing to its confiscatory character or because it conflicted with international law. Having found that the German legislation was a measure of economic protection in time of peace, Upjohn J. was able to apply it, thus following a line of cases beginning with *De Béeche v. South American Stores* [1935] A.C. 148 or perhaps with *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525 and ending with *Kahler v. Midland Bank* [1950] A.C. 24.

The court did not examine the question whether legislation substituting one debtor for another is as such confiscatory. Probably it is not: *Re Banque des Marchands de Moscou* [1952] 1 All E.R. 1269, at 1275, differing from that substituting one creditor for another without compensation: *Banco de Vizcaya v. Don Alfonso de Borbon* [1935] 1 K.B. 140, 144.

The matter could have rested here, but Upjohn J. proceeded to examine whether and to what extent foreign confiscatory legislation which is applicable according to the English rules of private international law is nevertheless excluded. He considered the cases in which foreign laws affecting proprietary rights are excluded on grounds of public policy because they are fiscal or penal, and incidentally allotted to a new category entitled "discrimination against the property of British nationals in time of war" the two cases (*Wolff v. Oaxholm* (1817) 6 M. & S. 92; *Re Fried. Krupp A.G.* [1917] 2 Ch. 188) which had lent themselves to various interpretations hitherto. Yet it may be asked whether they are not also instances of the exclusion of penal laws, and whether *Banco de Vizcaya v. Don Alfonso de Borbon* (*supra*) does not fall within the same category, rather than under a separate heading "legislation aimed at confiscating the property of particular individuals or classes of individuals." Upjohn J. then turned to the *Rose Mary* [1955] 1 W.L.R. 246 and rejected as contrary to established authority the principle enunciated there to the effect that foreign laws contrary to international law will not be recognised. There can be no doubt that English courts have on numerous occasions

recognised in general terms foreign legislation expropriating without compensation. Further, there is no evidence that the Court of Appeal in *Luther v. Sagor* [1921] 3 K.B. 531 and in *Princess Olga Paley v. Weisz* [1929] 1 K.B. 718 differentiated between legislation confiscating the property of nationals of the confiscating State, which can be recognised, and that of other nationals, which cannot. *Luther v. Sagor* has indeed been much overworked, chiefly because excessive attention has been devoted to the judgment of Scrutton L.J. at the expense of those of Bankes and Warrington L.JJ. Read in the light of the American authorities on which it is based, *Luther v. Sagor* refers only to acts of the executive, but not to legislation or judgments. It establishes that no action in tort lies in England against an individual in respect of an act done abroad which is to be attributed to the executive (see *Transactions of the Grotius Society*, 35 (1949) 157-188).

The decision in the *Rose Mary* is not only irreconcilable with the authorities. It creates practical difficulties (*contra* Sir H. Lauterpacht in [1954] C.L.J. 20; E. Lauterpacht in (1956) 5 I.C.L.Q. 301).

First, if English courts are to be required to examine the compatibility of foreign law with international law, a new burden is thrust upon them for which they are not particularly well equipped. It may involve an examination of extraneous facts, such as whether the compensation is adequate, prompt and effective.

Secondly, foreign law is proved as a fact, but compatibility with international law is a question of law. Thus appeals on foreign law must be envisaged, enjoying the binding effect of precedent, contrary to *Lazard Bros. v. Midland Bank* [1933] A.C. 289.

Thirdly, English courts would have to show greater favour to British claimants than to aliens, or to stateless persons. This savours of reprisals which, so far, have found no place in private international law, except in article 31 of the Introductory Law to the German Civil Code, a provision which has remained a dead letter.

Fourthly, the question arises whether the original defect in title adheres to the goods once they have reached another country and have been acquired by third parties in good faith for value (see Niboyet, *Revue de droit international privé* 24 (1929), 295; Van Hecke (1951) 4 Int. L.Q. 345, 354; Seidl-Hohenveldern (1949-50) 49 Mich.L.R. 851, 859-861; (1950) 13 M.L.R. 69).

The difficulties are less forbidding if English public policy rather than the technical rules of public international law must be the ultimate consideration.

There was no merit in principle or upon authority in the final

argument that the outbreak of war had abrogated the enemy debtor's obligation to pay in the future a liquidated sum of money arising out of a contract which had been performed by the English party and that, consequently, the original debt with its characteristics remained. Even if such a rule had existed, its extension to enemy debtors would have perverted the policy of the common law as to trading with the enemy.

K. LIPSTEIN.

CONFLICT OF LAWS—CONTRACT ILLEGAL BY FOREIGN LAW—WHETHER
ENFORCEABLE IN ENGLAND

IN *Regazzoni v. K. C. Sethia (1944) Ltd.* [1956] 3 W.L.R. 79, the Court of Appeal, affirming a decision of Sellers J. [1956] 2 W.L.R. 204, refused to enforce an English contract which offended against the law of India. The defendants had agreed to sell and deliver to the plaintiff a large quantity of jute bags, c.i.f. Genoa. India was almost the only producer of such bags and South Africa was a large consumer. At the time of the contract the Indian Government, in furtherance of her dispute with the Union about the treatment of Indians, had made regulations under the Sea Customs Act, 1878, prohibiting *inter alia* the export of jute bags directly or indirectly to the Union. Infringement of the regulations made the goods liable to forfeiture and the shipper liable to penalties. The plaintiff and the defendant were middlemen who sought to take advantage of scarcity prices resulting from this embargo. The contract on the face of it was innocuous, but it was clear from the evidence that the bags were to be shipped from India to Genoa, that the plaintiff intended to ship them thence to the Union, and that the defendant was aware of this intention. For some reason the bags were not delivered and the plaintiff sued for breach. It was agreed that the proper law of the contract was English law.

All the judges were of opinion that the contract was caught by the doctrine of *Foster v. Driscoll* [1929] 1 K.B. 470, which Denning L.J. expressed as follows: "if two persons agree together on a transaction which to their knowledge is intended to be carried out by means of one or other of them breaking the laws of a friendly country, or procuring or assisting another person in the breach of such laws, then the courts of this country will not lend their aid to the enforcement of the transaction."

It is impossible to quarrel with this conclusion. *Foster v. Driscoll* clearly negatived the earlier notion that an English contract will only be held invalid "if it *necessitates* the performance in a foreign and

friendly country of some act which is illegal by the law of such country" (Dicey, 4th ed., 1927, 620; italics supplied). But Denning L.J.'s statement of the rule in *Foster v. Driscoll* must, it is submitted, be read as qualified by the facts of the present case. Taken by itself it might be thought to include a performance in England of an English contract, lawful in England, but purportedly rendered illegal by the extraterritorial operation of some foreign law. Comity as hitherto understood does not require such extravagant homage. The rule of *Foster v. Driscoll* is that a contract will be held invalid in this country if the real intention of the parties "necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country" (per Sankey L.J., 521; italics supplied). This limitation is of course satisfied in the present case, where the intention was to procure an illegal export from India.

The plaintiff had sought to oust *Foster v. Driscoll* with the aid of the rule about penal, revenue and confiscatory laws. Birkett and Parker L.JJ. agreed with Sellers J. that this Indian law could not be said to be penal and it was obviously not confiscatory. Nevertheless, argued the plaintiff, it was a "political" law, and Rule 22 of Dicey (6th ed., 1953, 152) says the court has no jurisdiction to enforce a "penal, revenue or political" law. Both Birkett and Parker L.JJ. found themselves unable to attach any useful meaning to the term "political" in this context. This is hardly surprising. The notes in Dicey do not help, for all the cases there cited seem to be referable to another head, and it is submitted that if the term (not one used by Dicey himself) is retained in the next edition it might be clarified.

On this question Denning L.J. had a different approach. Even if this was a penal or political law, it made no difference to the case: for though it was true that the courts would not enforce a foreign penal or political law "at the instance of the foreign country," it was quite another matter to say, as Lord Mansfield did in *Holman v. Johnson* (1775) 1 Cowp. 341, 343, that we would take no notice of them. "It seems to me," said Denning L.J., "that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws, however they may be described, at least, to this extent, that if two people knowingly agree together to break the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement."

This is doubtless a valid distinction, but, with respect, it must again be understood in a qualified sense. For it is important, as du Pareq L.J. said in *Kleinwort's Case* [1939] 2 K.B. 678, 696, to

remember which are the rules and which the exceptions. The basic principle in a case concerning an English contract is the one laid down in that case and stated by du Parcq L.J. as follows: "one starts with the proposition that English law is the law which governs the performance of the contract. An elementary principle of English law is that people should keep their contracts and carry them out." So that even if the foreign law is not one of the penal, revenue or confiscatory kind, it does not follow that an English court construing an English contract will take notice of it. They will only do so if there is some positive reason such as the doctrine of *Foster v. Driscoll* for so doing. The doctrine concerning penal and suchlike laws only becomes relevant when it has been established first that the foreign law in question is relevant.

R. Y. JENNINGS.

STATUTORY INTERPRETATION—FINALITY CLAUSES—FRAUD

"FRAUD unravels everything," said Denning L.J. in *Lazarus Estates, Ltd. v. Beasley* [1956] 1 Q.B. 702; "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud." But the words were hardly out of his mouth—that is to say, they had stood for only a few weeks in the *Weekly Law Reports*—before the House of Lords, in *Smith v. East Elloe Rural District Council* [1956] 2 W.L.R. 888, held that fraud would not "unravel" a compulsory purchase order. The two cases make a contrasting pair, and illustrate a general problem of statutory interpretation which is none the less interesting because it is insoluble by any cast-iron rule.

Let it be made clear at once that in neither case was fraud proved as a fact; the question was whether, as a matter of law, allegations of fraud would, if substantiated, vitiate the proceedings. In both cases the court had to weigh its natural inclination to make an exception for fraud against the express provisions of two Acts of Parliament, similar in language but somewhat different in subject-matter, which provided for finality after a certain period of time.

The *Lazarus* case concerned a notice for increase of rent served under the Housing Repairs and Rents Act, 1954. The notice was accompanied by the statutory declaration of expenditure by the landlord on repairs, stated to be £566. The Act allows the tenant twenty-eight days in which to challenge such a declaration, but subject to that it lays down that "the validity of a declaration shall not be questioned on the ground that the value of the work of

repair stated in the declaration to have been carried out . . . is less than that required. . . ." The tenant let the twenty-eight days pass, but later challenged the declaration on the ground that £300 worth of the specified work had never been done, and that "the declaration was false and fraudulent to the knowledge of the landlords or their servants or agents." The question was whether the tenant could escape from the time limit if she could prove her allegation of fraud: would it vitiate the declaration altogether? The county court judge answered these questions in the negative, on the ground that the Act clearly intended to make a declaration final after a limited time, and that the court had no power to extend the time. But the Court of Appeal reversed him, by the majority opinions of Denning and Parker L.JJ., Morris L.J. dissenting. Denning L.J. held that "fraud" was a different ground of challenge from that specified in the Act, namely, that the specified work had not been done—even though, as Morris L.J. said, the substance of the complaint in both cases was the same—and he went on to say that landlords who made fraudulent declarations could not be allowed to profit from their fraud. "Fraud unravels everything," even the judgment of a court, as in the *Duchess of Kingston's Case* (1776) 20 St.Tr. 537. "So here I am of opinion that if this declaration is proved to have been false and fraudulent it is a nullity and void, and the landlords cannot recover any increase of rent by virtue of it."

The *East Elloe* case is an almost exact counterpoise. The Acquisition of Land (Authorisation Procedure) Act, 1946, provides that "... a compulsory purchase order . . . shall not . . . be questioned in any legal proceedings whatsoever . . .," except that within six weeks it may be challenged in the High Court "on the ground that the authorisation . . . is not empowered to be granted under this Act." The appellant's land was taken for a housing estate under an order made in 1948, but it was not until 1954 (much nearer six years than six weeks later) that she began her action for trespass, an injunction, and a declaration that the order was made wrongfully and in bad faith. The defendants were the Rural District Council, who had made the order, their clerk, who had acted for them, and the Ministry of Health (later the Ministry of Housing and Local Government), who had confirmed the order. In the meantime the appellant's land had been cleared and several council houses had been built upon it. This was of course an important practical, if not legal, consideration, for it meant that if the order was to be invalidated retrospectively, much public money would have been wasted, and the Council's housing scheme would have suffered a severe setback. Nevertheless it was only by a majority

of one that the House of Lords decided that the order (and the houses) should stand. Lord Simonds, Lord Morton and Lord Radcliffe were of opinion that the jurisdiction of the courts was ousted by the Act, once the six weeks were up; Lord Reid and Lord Somervell, dissenting, would have made an exception for fraud, and were prepared to face all the practical difficulties in order that a person defrauded (as she alleged) should not be left without redress. The House was, however, unanimous in holding that the impregnability of the order did not prevent the claim for damages being prosecuted against the clerk to the Council personally.

It may be thought that the formula "shall not be questioned in any legal proceedings whatsoever" is a shade or two more imperative than "shall not be questioned." But the use of the latter phrase in the Housing Repairs and Rents Act was clearly dictated by the context, and questions of composition, rather than by any intent to restrict its meaning. It is surely not here that the scruple is to be found that tips the scales. It must lie rather in the differing background of the two Acts, and the courts' appreciation of their different policies. Parliament has always sought to give finality to compulsory acquisition, for it is essential that land acquired for public purposes should come with a clear title. The old form of words, *e.g.*, as in the Housing Act, 1925, was that the Minister's confirmation should be conclusive evidence that the order was valid. This was criticised by the Donoughmore Committee (Cmd. 4060, 1932, pp. 41, 61), who said that even where finality was important there should be a period for challenge of at least three and preferably six months. Later Acts followed this recommendation in principle, but gave only the niggardly period of six weeks, described by Lord Radcliffe (at p. 910) as "pitifully inadequate." But that, for the purposes of the case, helped to make the overriding intent of finality all the clearer. In the *Lazarus* case, on the other hand, this element of the public interest was lacking; the question was merely whether a rent could be raised, and there the court could find room for its traditional attitude that fraud is all-vitiating. But to erect this into a universal rule, particularly as extending to orders of Ministers, is to put it too high.

Their Lordships did not elucidate their conclusion in the *East Elloe* case that it was possible for an officer of the Council to be liable in damages even though the order itself was valid. The conception itself is not an easy one, at any rate as applied to the appellant's claim, which was for damages for trespass. But there is nothing impossible about the acquisition of a good title by tortious means,

as, for example, in the conversion of chattels; and to give a remedy in damages only is an apt solution of the difficulty where it is injurious to the public interest to restore the land.

H. W. R. WADE.

CONTRACT—BILL OF LADING—STRIKE CLAUSE

As Mr. R. A. MacCrindle writes in his note on *The Caspiana Case* [1956] 1 Q.B. 462, in [1956] C.L.J. 5, the judgments of the Court of Appeal and of McNair J. have aroused wide interest among the shipping, banking and insurance fraternities. The interest has also been international. Much of the litigation in the sea ports outside the United Kingdom arising out of a maritime contract of carriage turns on a clause drafted in the light of a decision of an English court.

Mr. MacCrindle's view that the provisions of clause 14(c) and (f) of the bill of lading give the shipowner the liberty never to perform the carriage at all (and that therefore the clause is bad at common law) is based on a hypothetical situation. It is difficult to imagine such a situation arising in practice unless the discharge of the cargo at the loading port was in the interest of goods. One can conjure up the picture of a shipmaster loading oranges in Long Beach for a European port and suddenly being informed that the Canal Zone is either strike or quarantine bound for such a period of time that his cargo will be fermented when it finally gets through. The abuse of this clause presupposes a very high degree of irresponsibility: in the words of Singleton L.J. at p. 499, "It could seldom happen that the goods would be discharged at the port of loading; the master must always act reasonably."

Mr. MacCrindle's submission that Article I (e) of the Hague Rules merely identifies the respective points of time at which the operation of "carriage of goods" begins and ends is very convincing but it is hard to understand how the French term "transport" more clearly suggests movement from one place to another than the English term "carriage." "Transport" is defined in the Belgian Hague Rules (Code de Commerce, Liv. II, Tit. II, Art. 91 §1^{er}(e)) as follows: "'Transport de marchandises' couvre le temps écoulé depuis le chargement des marchandises à bord du navire jusqu'à leur déchargement du navire." Art. I (e) of the Schedule to the Carriage of Goods by Sea Act, 1924, provides that "'Carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." At the Hague Conference in 1921 (International Law Association, Thirtieth

Conference, Vol. II) the leading maritime lawyers and adjusters of the day endeavoured to draft similar English and French versions of the Convention. May it be suggested with great respect that Mr. MacCrindle has overlooked that "transport" is defined in French in terms analogous to the English definition?

Of course ships do often discharge at the port of loading, not as the result of whatever Mr. MacCrindle has in mind under clause 14 (c) and (f) of the *Caspiana* bill, but as the result of accident, sacrifice or other extraordinary circumstances giving rise to general average. The frequency of this type of casualty has found expression in Rules X (Expenses at Port of Refuge) and XI (Wages and Maintenance of Crew and other Expenses bearing up for and in a Port of Refuge) of the York-Antwerp Rules, 1950.

(The above note has been contributed by Mr. G. J. Fletcher (Trinity College), now a partner in a firm of average adjusters at Antwerp.)

LOSS OF SERVICES—ACTION PER QUOD SERVITIUM AMISIT—
QUASI-CONTRACT—NEW REMEDIES FOR OLD

THE short point decided in *Inland Revenue Commissioners v. Hambrook* [1956] 3 W.L.R. 643 was that the action *per quod servitium amisit* is not available to the Crown so as to enable it to recover for loss of the services of an established civil servant. In the court below ([1956] 2 W.L.R. 919) Lord Goddard C.J. based his decision on the ground that the relationship existing between the Crown and a civil servant was different in kind from the relationship of master and servant necessary to support the action. The Court of Appeal preferred to rest its conclusion upon the broader ground that the action is available only in the case of a menial servant properly so called, that is, a servant forming part of his master's household. Even though the relationship of master and servant may exist, the action does not lie unless the servant be of this particular class.

Although the judgments are of great value in themselves, particularly to the legal historian and the constitutional lawyer, it is perhaps for its general approach to the action *per quod servitium amisit* that the case is of most interest to the common lawyer. It has for long been assumed that the action was available to the Crown (the point was conceded in *Att.-Gen. v. Valle Jones* [1935] 2 K.B. 209) and despite the decision of the Privy Council in *Att.-Gen. for New South Wales v. Perpetual Trustee Co.*

[1955] A.C. 457, it would probably have been possible for the court to have decided the present case in favour of the Crown. The attitude of the courts to this class of action has, however, been one of open hostility at least since the decision of the House of Lords in *The Amerika* [1917] A.C. 38, and it is clear that the real reason for the Court of Appeal's decision was its desire to confine the action within the narrowest possible limits.

The action *per quod servitium amisit* has its origin in the Year Book period and is generally recognised to be based on the outmoded theory that a master has a proprietary interest in his servant, but it has produced some useful offshoots in the past. In particular the action for procurement of a breach of contract owes its origin to the action, and such redress as is available for seduction is well known to be founded on loss of services.

Although actions derived from it may continue to serve a useful purpose in the modern law, it is now however apparent that in its original form the action *per quod servitium amisit* is an anachronism and of no surviving value. Those lawyers who regret that English law provides no remedy for negligent interference with contractual or other pecuniary interests may also regret that previous generations of judges failed to make use of the action to develop such a remedy; but there can now be no doubt not only that the courts will refuse to enlarge its scope but also that the action itself is no longer capable of development. Its very existence was described as an anomaly by Lord Sumner in *The Amerika* and the technicalities and illogicalities by which it is surrounded are such that one can only agree with him. Maitland has said that "any one who really possesses what has been called the historic sense must, so it seems to me, dislike to see a rule or an idea unfitly surviving in a changed environment. An anachronism should offend not only his reason, but his taste." (*Collected Papers*, III, p. 486.) The action *per quod servitium amisit* is an anachronism no longer capable of any useful function and should be given decent burial.

On the other hand it seems right that, at least in certain cases, a tortfeasor who causes personal injury to A and thereby also causes pecuniary damage to B should be liable to B as well as to A, and one possible line of development is suggested by three recent cases (*Receiver for the Metropolitan Police District v. Tatum* [1948] 2 K.B. 68; *Receiver for the Metropolitan Police District v. Croydon Corporation* [1956] 1 W.L.R. 1113; *Monmouthshire County Council v. Smith* [1956] 1 W.L.R. 1132). In each of these cases a police constable had been injured by the negligence of the defendant and thus prevented from performing his duties. The plaintiff in each case was the authority charged with the payment of the constable

in question. It remained under a statutory duty to pay, and did pay, his wages during the period that the constable remained in employment and unable to work. The action *per quod servitium amisit* was not available to the plaintiffs, since they did not in any sense employ the constables and they therefore sought to recover in quasi-contract. Atkinson J. in the *Tatum* case and Slade J. in the *Croydon Corporation* case upheld the plaintiffs' claims, but in the *Smith* case Lynskey J. refused to follow these decisions and gave judgment for the defendant.

In its essentials the argument advanced by the plaintiffs was an assertion of the principle stated in Leake on *Contracts* (8th ed., p. 46), and approved by Cockburn C.J. in *Moule v. Garrett* (1872) L.R. 7 Ex. 101 and by Lord Wright M.R. in *Brook's Wharf & Bull's Wharf v. Goodman* [1937] 1 K.B. 534. This principle is that ". . . where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."

The application of this principle in its precise terms to cases of the kind now under consideration obviously raises some difficulties. As Lynskey J. pointed out, it was not the defendant's negligence, but the statute which compelled the plaintiffs to pay the constables' wages, and he also stated that the defendants were not liable to the constables for loss of wages for the simple reason that the constables did not lose their wages. In fact Lynskey J. regarded the claim before him as neither more nor less than a claim for loss of services by a plaintiff who had lost no services. Slade J. was not unaware of these difficulties and based his judgment on the premiss that the constable had an election. He could claim his wages either from the plaintiff or from the defendant and therefore, since the plaintiff had in fact paid the wages and since the defendant was "primarily" liable to pay them—in the sense that a principal debtor is "primarily" liable as between himself and a surety—the principles of quasi-contract required that the defendant should reimburse the plaintiff.

Leave to appeal out of time has now been granted in the *Smith* case, and it may be permissible to hope (with great respect) that the Court of Appeal will uphold the decisions in the *Tatum* and the *Croydon Corporation* cases. If necessary, recourse could be had, as Slade J. appreciated, to the wide equitable doctrine stated in *Whitham v. Bullock* [1939] 2 K.B. 81, 85 that "if, as between several persons or properties all equally liable at law to the same demand, it would be equitable that the burden should fall in a

certain way, the court will so far as possible, having regard to the solvency of the different parties, see that, if that burden is placed inequitably by the exercise of the legal right, its incidence should afterwards be readjusted."

This is a wide principle which must obviously be applied with caution, but the class of case now under consideration would seem to provide an important area for its operation. In present day circumstances it is desirable that a man's wages should continue to be paid during a period of incapacity, and this should not be discouraged by the law. In some cases the employer will be required to continue payment either by statute or by the terms, express or implied, of the contract of service, and in such cases it seems plain that he should be entitled to recover from the tortfeasor. Even if the employer comes under no legal obligation to continue payment, however, it is reasonable for him to continue to pay wages at least for a limited period, and, if he does so, he should have a right over against the tortfeasor. The action *per quod servitium amisit* can no longer be regarded as a satisfactory starting point for the development of remedies of this kind. The law of quasi-contract, however, aided if necessary by equity, offers opportunities which it is to be hoped the courts will not reject.

J. A. JOLOWICZ.

TORT—RES IPSA LOQUITUR—BURDEN OF PROOF ON DEFENDANT

IN cases where the plaintiff can rightly assert *res ipsa loquitur* the vexed question of how far the defendant must go to discharge the burden of proof which the maxim is said to throw upon him has never been authoritatively decided. Two views emerge from the cases, the first, which may be called the presumption of law theory, is that the burden is on the defendant to prove that the accident occurred without his negligence; the second, which may be called the rule of evidence theory, is that there is a burden on the defendant to give a reasonable explanation of how it may have happened without his negligence, but it does not extend to disproof of negligence, that is, his explanation is taken into consideration with the inference of negligence in deciding on the whole whether the balance of probability favours the plaintiff or the defendant. An examination of the cases in earlier volumes of this Journal (see (1951) 11 C.L.J. 74-92 and [1954] C.L.J. 118-132) indicated a preference for the second view, which was later approved by Singleton L.J. in *Southport Corporation v. Esso*

Petroleum Co., Ltd. [1954] 2 Q.B. 182 at p. 193: "If the defendants have produced a reasonable explanation, equally consistent with negligence or no negligence, the burden of proving that the defendants were negligent and that their negligence caused the damage rests upon the plaintiffs."

Support for the first view, however, is to be found in *Moore v. R. Fox & Sons* [1956] 1 Q.B. 596, a case which Evershed M.R. found to be one "of perplexing anxiety and of great difficulty." A workman employed by the defendants was killed instantaneously by an explosion of gas while operating a de-rusting tank which was filled with liquid chemicals and heated by gas, thermostatically controlled. The plaintiff, the widow and administratrix of the deceased, sued the defendants for damages for negligence. The trial judge, Streatfeild J., found that (i) the explosion was due to an accumulation of unburnt gas exploded by one of the continuously burning jets, but the reason why the gas accumulated was never determined; and (ii) it was the duty of the defendant's maintenance man to inspect the apparatus weekly, and of their foreman to supervise the plaintiff's husband and not to allow him to work the gas apparatus until satisfied that he was competent to do so. It is important to note that the defendants did not call the foreman or the maintenance man as a witness. But they called four expert witnesses who examined the apparatus after the explosion. Their explanation, based on theoretical possibilities, was regarded by the trial judge as indicating that the accident was just as likely to have occurred without the defendant's negligence as with it, and was, therefore, sufficient to rebut the inference of negligence arising from the fact of the accident itself. Accordingly he gave judgment for the defendants.

Evershed M.R., with whom Birkett L.J. concurred, held that the doctrine *res ipsa loquitur* applied and that the plaintiff was entitled to recover damages, reversing the decision of Streatfeild J., who had also held the doctrine to be applicable. Romer L.J. doubted whether the doctrine applied. One requisite for the application of the maxim is that the *thing* which causes the harm must be, at the material time, wholly under the control of the defendant or of persons for whom he is vicariously liable: *Easson v. L. & N. E. Ry.* [1944] K.B. 421, 422, *per* Goddard L.J. Evershed M.R. regarded the "thing" as the machine (at p. 611) whereas Romer L.J., said "The 'thing' is, I suppose, the explosion of the gas" (at p. 618). In the instant case it is arguable that the *thing* was under the control of the defendants, the deceased workman (a plaintiff) and the gas company (at p. 602), but Evershed M.R. held the maxim applied on the ground that this was, after all, a case in

which the deceased was employed by the defendants to use this machine (at p. 611), and (at p. 615) he referred to a dictum of Lord Dunedin in *Ballard's Case*, 1923 S.C. (H.L.) 43, 53 to the effect that in such a case it would be upon the employer to show that the defect was one against which he could not have guarded. Romer L.J. took the contrary view—"The explosion might, if nothing were known about it beyond its mere occurrence, quite reasonably be attributed to some cause or causes other than negligence by the defendants, including carelessness on the part of the deceased himself" (at p. 618).

As to the burden of proof, the Master of the Rolls, with whom Birkett L.J. agreed, stated that a case of *res ipsa loquitur* "throws upon the defendants the onus of explaining the accident so as to absolve themselves from the implication of negligence" (at p. 610), and he applied (at pp. 611-612) the dicta of Asquith L.J. (as he then was) in *Barkway v. South Wales Transport Co., Ltd.* [1948] 2 All E.R. 460, 471 (later reversed by the House of Lords who held it was not a case of *res ipsa loquitur*), namely, "(i) There is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, without more . . . that the immediate cause . . . is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. . . . (iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) . . . A specific cause which does not connote negligence on their part as more probable, or (b) . . . that they used all reasonable care. . . ." He discounted (at p. 613) the dicta of Langton J. in *The Kite* [1933] P. 154, 168, which have been approved in subsequent cases, as inconsistent with Asquith L.J.'s second proposition and the language of Lord Radcliffe in the *Esso Petroleum Case* [1956] A.C. 218, 242-243. Langton J.'s dicta were based on the dissenting speech of Lord Dunedin in *Ballard v. North British Railway Co.*, 1923 S.C. (H.L.) 43, 54: "Where the circumstances warrant the view that the fact of the accident is relevant to infer negligence . . . if the defenders can show a [reasonable] way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence." Evershed M.R. (at p. 614) took the view that Lord Dunedin had in mind rather the circumstances that give rise to a *res ipsa loquitur* situation than the consequences which properly

follow from it. This, with respect, is unconvincing, in the face of the italicised words in the quotation. In the instant case the explanations given were those of four expert witnesses alone, the result of whose evidence was after all "that the accident was inexplicable" (at p. 608) or at best showing theoretical possibilities of ways in which the accident might have happened some of which were consistent with the absence of negligence (at p. 615). So that whichever of the two views expressed above is adopted, on the evidence as it emerged at the trial, the defendants had failed to rebut the inference of negligence. It seems that a defendant may still be able to rebut the presumption by giving a *reasonable* explanation of how the accident could have happened without his negligence, for what inferences shall or can be drawn is a question of fact, not of law. When evidence has been given for the defence the question is not, "Does the accident of itself point to the defendant's negligence, but is it right on the evidence as a whole to find him guilty of negligence?": *Woods v. Duncan* [1946] A.C. 401, at p. 435 *per* Lord Porter.

The court unanimously decided that if the case was not one of *res ipsa loquitur*, and therefore the burden of proving negligence had rested throughout on the plaintiff, then on weighing, against the defendants' evidence, the evidence given on the plaintiff's side plus the inferences drawn from the failure of the defendants to call two vital witnesses, the plaintiff had satisfied the court that the defendants had been negligent; for the inference to be drawn from this omission was that the "accident should not, and would not, have happened if proper care had been applied to the apparatus" (*per* Evershed M.R., at pp. 608, 610, 616).

The doctrine of *res ipsa loquitur* has been much criticised (see [1951] 11 C.L.J. 77), and there is uncertainty as to when it applies and as to what it requires of the defendant. It has no place where the facts are known (*Barkway v. South Wales Transport Co., Ltd.* [1950] 1 All E.R. 392) and the present case shows that it might well be discarded entirely, for the same result was reached without applying the maxim.

T. ELLIS LEWIS.

TORT—OCCUPIERS' LIABILITY TO LICENSEE—EFFECT OF NOTICE
EXCLUDING LIABILITY—KNOWLEDGE OF DANGER

IN *Ashdown v. Samuel Williams & Sons, Ltd.* [1956] 3 W.L.R. 128 Havers J. was called upon to decide a point that is of particular interest in view of the provisions of the Occupiers' Liability Bill,

1956, which is likely to come into force in 1957. Clause 2 (1) of the Bill (which is a great improvement on the form of words recommended by the Law Reform Committee: [1955] C.L.J. 9) will provide that "an occupier of premises owes the same duty, the 'common duty of care,' to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise." Some reactionary commentators on the Law Reform Committee's Report (the writer of this note in particular) had gloomily prophesied that such a provision might well produce a rash of notice boards and a spate of cases on their interpretation. The *Ashdown* case deprives them of the opportunity of saying "we told you so," for it relates to the effect of a notice, excluding liability, on the claim of a licensee injured as long ago as 1949. The notice was on a board three feet high, mounted at such a height that the bottom of the board was eight feet three inches from the ground. It could be seen by anyone using the route and was decipherable from the ground. It was headed "Notice and Warning" in capital letters. It opened with the words: "This property is private property. Every person, whether an invitee or otherwise, whilst on the said property is there entirely at his own risk and must be deemed to take the said property with everything thereon as he finds it with notice of the nature, condition and state thereof. . . ." It excluded liability for injury or damage whether or not due to any negligent act, breach of duty, default and/or omission by the defendants. It concluded with the inelegant words: "All persons are only allowed to be on the said property upon the distinct understanding that they do so entirely at their own risk." Havers J. found that the plaintiff was a licensee; that she saw the notice; that she saw the words "Notice and Warning"; that, although she only read the first few lines of the notice, she knew that it concerned her and that she was on the premises at her own risk. He was satisfied that the remainder of the notice, which she did not read, was clearly legible and could have been read by her if she had wanted to do so. He was told that there was no authority which would assist him on the point other than the well-known cloak-room ticket case, *Parker v. South Eastern Railway Co.* (1877) 2 C.P.D. 416. Relying on this, and on general principle, he held that the plaintiff was bound by the terms of the notice and that the defendants were not under the duty which they otherwise would have been under as licensors to a licensee. It must be remembered that in *Ashdown* it was found as a fact that the plaintiff was aware of the notice and read part of it. Her counsel admitted that, in so far as she read it, she was bound by it. The fact that she left the rest unread, when she could have read it,

was held not to avail her. But the case goes further than this. There was a second notice. Havers J. was not satisfied that the plaintiff actually saw this notice, but he was satisfied that the notice was there and was plainly visible to anyone who kept his eyes open. He thought that the defendants "did what was reasonably sufficient to give the plaintiff notice of the terms contained in that notice." He held, therefore, that the plaintiff was also bound by the terms of the second notice, although it was not necessary for the purposes of the case to rely on it. So all the rules of the ticket cases were applied to the imposition of terms in a licence, and the plaintiff was refused a remedy against the occupiers. (It is comforting to note that she succeeded in a claim against her employers subject to a reduction of one-fifth for her own contributory negligence.)

Although this seems logical enough, it is disturbing. One of the difficulties of the *Ashdown* case is that the injury to the plaintiff was not caused by the static condition of the premises but by a negligent shunting operation. It is true that the notice purported to exclude liability for negligently conducted operations, but the plaintiff had not read this part of it. She was not *volens* in any ordinary meaning of the term. She was defeated by a term of the licence to enter of which she ought to have been aware. While one has sympathy with a defendant who seeks to exclude liability to a licensee in respect of the condition of premises which he has no wish to keep in repair, one tends to have less sympathy with him in his efforts to exclude his duty, owed to anyone lawfully on the premises, to take care in the doing of things on the premises. The difference between the occupancy duties and the activity duties of an occupier is stressed in the Court of Appeal in the later case of *Slater v. Clay Cross Co., Ltd.* [1956] 3 W.L.R. 232, in which the plaintiff was injured by the negligent driving, at some eight miles an hour, of a small gauge train carrying limestone. In this case there was no notice-board excluding liability. The plaintiff was a licensee, but the distinction between licensee and invitee was irrelevant as the injury was caused by a current operation on the premises. The plaintiff was guilty of contributory negligence which reduced her claim by 40 per cent., but the court refused to apply the maxim *volenti non fit injuria* on the ground that although the plaintiff voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, she did not take the risk of negligence by the driver. Her knowledge of the danger was a factor in contributory negligence, but not a bar to the action. But a notice which she did not read but could have read would have barred her claim, on the authority of *Ashdown*.

The case of *Slater* is remarkable also for Denning L.J.'s apparent

rejection of the House of Lords' decision in *London Graving Dock Co., Ltd v. Horton* [1951] A.C. 737, and for his insistence that the distinction between invitees and licensees has been reduced to vanishing point. He states the law rather as if the Occupiers' Liability Bill, 1956, were already in force, but his remarks are *obiter* and, in any case, in a few months' time the legislature may catch up with his Lordship.

F. J. ODGERS.

TORT—VICARIOUS LIABILITY

THE facts of *Crook v. Derbyshire Stone, Ltd.* [1956] 1 W.L.R. 432 were simple. One Bertie Thorpe, the second defendant, who was employed by the first defendants, was on occasion obliged in the course of his duties to drive one of their vehicles to a certain destination, the journey being made between the hours of 4 a.m. and 8 a.m. It was his practice on these occasions, and a practice which enjoyed the implied sanction of his employers, to stop on the route to obtain refreshment. On one such occasion he halted his vehicle and proceeded to cross the road on foot to enter a café on the other side. In doing so he collided with the plaintiff who was riding his motor-cycle, and both suffered injuries. Thorpe was admittedly negligent. The only question for decision was whether his employers were vicariously liable for his negligence. In a reserved judgment at Derby Assizes Pilcher J. held that they were not.

This decision was arrived at through the application of the following test: was the act which the servant performed negligently one which he was *employed* to do, or was it one which was *incidental* to his employment? Pilcher J. decided that this act (crossing the road for refreshment) was not one which he was employed to do.

Now if this be the test, the decision justifies itself. But is it in fact the correct test? It is submitted that it is not, in that it confines the master's liability too narrowly. The traditional test is wider. Willes J., in delivering the judgment of the Exchequer Chamber in *Barwick v. English Joint Stock Bank* (1867) L.R. 2 Ex. 259 (which is often regarded as the classical authority on the point), spoke of wrongs committed "in the course of the service" (p. 265). Thus judges generally ask themselves if the wrong was done "in the course of his employment" and Lord Macnaghten emphasised in *Lloyd v. Grace Smith & Co.* [1912] A.C. 716 at p. 736 that this expression "must be construed liberally." It seems therefore that the true test is whether the servant was acting in the course of his employment (liberally construed) or whether in the words of Baron

Parke in *Joel v. Morrison* (1834) 6 C. & P. 503 he was "on a frolic of his own." Pilcher J. concedes at the outset of his judgment that the driver's practice of stopping at wayside cafés for refreshment was "a necessary practice, was well known by [his employers] and was sanctioned by them impliedly" (p. 433). If this be so, it can hardly be said that he was "on a frolic of his own." Rather was he acting in the course of his employment (liberally construed).

In reaching his decision Pilcher J. distinguished the case of *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* [1942] A.C. 509. There the driver of a petrol lorry, while waiting for the petrol from his lorry to flow into the underground tank of a garage, negligently lit a cigarette and threw away the match, thereby causing a conflagration. This act was held by the House of Lords to be in the course of his employment. However, said Pilcher J. (at p. 436) "when [that driver] negligently threw down the match he was engaged on his master's business, namely supervising the discharge of the petrol." But was not Thorpe engaged on his master's business (liberally construed) if what he did was a "necessary practice" in the performance of that business? If one can be said to be engaged on one's master's business when one lights a cigarette during the transmission of petrol, then a fortiori can one be said to be engaged on one's master's business when one stops for a cup of tea in the course of four hours' continuous driving. For if safety (to one's master's property and to other people) deprecates the first, it commends the second.

If one may say so with the greatest respect, the judge seems to have attached undue significance to the fact that this employee *left* his lorry to go for his refreshment: "he had no further duty to perform on his master's account until he returned to his lorry and resumed his journey"; and "he was a stranger to his master from the moment when he left the lorry" (p. 436). But is this material? His duty was to make the journey, not merely to attend the vehicle. Let us suppose that, instead of parking the lorry and crossing the road on foot, he had driven the lorry across to the other side of the road and had collided with the plaintiff while doing so. Presumably the decision would have gone the other way, though there seems to be no distinction in principle between the two sets of facts.

Finally, although it may be argued that no good purpose is served in cases of this nature by having regard to other decisions which so often turn on their particular facts, one must surely consider *Whatman v. Pearson* (1868) L.R. 3 C.P. 422. This was after all a decision which was binding on the court, though it does not appear to have been cited. It too concerned a driver, though his

vehicle was simply a horse-drawn cart. This driver was allowed by his employers to take an hour for his dinner, but he was expressly forbidden (1) to go home to dine, (2) to leave his horse and cart unattended. However, the driver saw fit both to go home for his dinner (involving a digression from his route of a quarter of a mile) and to leave his horse and cart unattended outside his home while dining. The horse duly ran away and damaged the plaintiff's property. It was held unanimously by the four judges of the Court of Common Pleas that it had been properly left to the jury to say whether the driver was acting within the scope of his employment and that the jury were justified in finding that he was. Bovill C.J. said that it was "through [the driver's] negligence . . . whilst acting in the course of his employment that the accident occurred." Byles J. said that the driver was acting "within the general scope of his authority." Now if this driver was still within the scope of his employment when a quarter of a mile from his authorised route and while deliberately breaking two express commands of his employer, how much more so is the driver of the lorry who is still on his authorised route and is doing an act not forbidden but impliedly sanctioned by his employer?

J. C. HALL.

TORT—NEGLIGENCE—STANDARDS OF CARE—VICARIOUS LIABILITY

IN *Staveley Iron and Chemical Co., Ltd. v. Jones* [1956] 2 W.L.R. 479 the House of Lords has affirmed the Court of Appeal's decision noted in [1955] C.L.J. 151 (where the facts are set out). The employers were held liable to their workman, the plaintiff, who had been injured by the negligent acts of their crane driver without, it was found, contributory negligence on his part. The route by which their Lordships reach this conclusion is very different from that followed in the court below by Denning L.J., whose judgment is decisively rejected. Four points arise for comment here.

First, the "*Caswell* test," that it is "not for every risky thing which a workman in a factory may do in his familiarity with machinery that a plaintiff ought to be held guilty of contributory negligence," is primarily applicable to cases of breach by an employer of strict statutory duty. It may be applicable only to such cases (Lord Reid at p. 408); if not, it is probably to be applied in common law cases only to plaintiffs who perform "repetitive work under strain or for long hours at dangerous machines" (Lord Tucker at p. 413; Lords Morton and Cohen agreed; Lord Tucker concurred in Lord Morton's speech; Lord Porter agreed with them

both; Lord Reid's speech stood apart). The restriction of the "*Caswell* test" is to be welcomed, for contributory negligence does not need it after the Law Reform (Contributory Negligence) Act, 1945.

Secondly, this doctrine of "excusable lapse," sometimes appropriate to contributory negligence, is not relevant to the tort of negligence itself. Its reasoning is never to be used to determine whether a defendant has exercised due care towards a plaintiff to whom he owes a duty. Further, the nature of that problem is the same whether the plaintiff is a fellow-workman or a stranger (Lord Reid at p. 408; Lord Morton at p. 405; Lord Tucker at p. 414). To apply special considerations of "excusable lapse" where the plaintiff was a fellow-workman would be to resurrect common employment.

Thirdly, a master's "personal" duties (which he cannot avoid by delegation: Lord Morton at p. 406; Lord Tucker at p. 413) must still be distinguished from his vicarious liability. The insistence of their Lordships upon this point is welcome, and leaves (it is submitted) no room for further manoeuvre. It is now clear that liability for a servant's acts does not depend upon any "personal duty" of the master's to see that care is taken; it is a vicarious liability which depends upon the initial tort committed by the servant (Lord Morton at p. 406). To the reasons advanced by their Lordships, and in the previous note, for regarding this distinction as still critical, it is desired to add here one more. Under the Law Reform (Personal Injuries) Act, 1948, s. 1 (3), the master is not permitted to exempt himself from vicarious liability for the default of a servant *in common employment* with the plaintiff and a contract is void "in so far" as it attempts to do this. But the Act has not, nor yet has any case, forbidden him from contracting out of his *personal* duty, e.g., to provide a safe system of work, etc. (that was presumably the effect of the clause in *Smith v. British European Airways Corporation* [1951] 2 K.B. 893); but it does not seem possible to contract out of statutory duties: see *Wheeler v. New Merton Board Mills* [1933] 2 K.B. 669. Already some employers have begun to adopt the modern fashion for exemption clauses in contracts of service, and, unless trade unions intervene, no doubt more will follow. It is arguable that Parliament should intervene now to prevent such a development.

Fourthly, their Lordships partly face the difficulty foreseen by Denning L.J.: is there any situation in which the master is (vicariously), but the servant is not, liable? The difficulty dissolves, of course, if the master's liability is always thought of as "personal." But what is the answer now that true vicarious

liability is authoritatively re-established? At first sight the majority appear to assert uncompromisingly that whenever "the servant is immune, so is the employer" (Lord Morton at p. 406)—whatever the nature of the immunity. It is, however, suggested that, on a closer reading, the speeches of Lords Morton and Tucker do not disclose a desire to overrule *Broom v. Morgan* [1953] 1 Q.B. 597 so as to exempt the master where the servant's immunity is only "procedural." What they demand is that the servant should, in the course of his employment, be "negligent." If he is, the employer is liable. But what is "negligence" and what is "immunity" in this context? What happens if a careless servant can plead *volenti non fit injuria*? In the Court of Appeal Denning L.J. suggested that the master remains liable, citing *Stapley v. Gypsum Mines, Ltd.* [1953] A.C. 668. Lord Reid (at p. 409), while indicating that that case does not in itself support it, is apparently disposed to agree with this conclusion, because the servant still remains guilty of a wrongful act, and is at "fault," even if the defence of *volenti non fit injuria* gives him immunity. But "fault" surely depends upon duty. Our problem is, therefore, at once seen to turn on the old question whether *volenti non fit injuria* is really a "defence" to negligence, or whether it is not a "denial of any duty at all," as Asquith L.J. once called it—an assumption of risk whereby "the defendant is relieved of any responsibility to the plaintiff to use reasonable care to prevent that risk from materialising" (Street, *Law of Torts*, pp. 169–170). It is difficult to agree with Lord Reid if the maxim is given this meaning.

If that is correct, perhaps *Stapley's* case shows us only that an agreement among workmen to use unsafe methods of work does not necessarily amount to a sufficient assumption of risk on the part of each man to negative the duty of care. In *Williams v. Port of Liverpool Stevedoring Co.* [1956] 2 All E.R. 69 Lynskey J. recently took the view that the duty owed by each to the others was not destroyed by just such an agreement, and made the master vicariously liable; but his finding that *Stapley's* case bound him so to hold probably goes further than is necessary. What the courts are doing is, in effect, to carry over into the vicarious liability cases the process, far advanced in the personal duty cases, of rejecting the clumsy weapon of "consent" for the now more flexible tool of contributory negligence.

These are all questions which the four concurring Law Lords in the *Staveley* case do not investigate. They appear to support the view that the employer is immune if the servant can plead *volenti non fit injuria*; but it may well be that their failure to explain fully the nature of this defence, its relation to "negligence,"

and the real meaning of *Stapley's* case, will be seized upon by other judges in subsequent cases as a pretext for further debate.

K. W. WEDDERBURN.

CRIMINAL LAW—LARCENY—DISHONEST APPROPRIATION

ONCE again the deficiencies of the law of larceny as an offence dealing with dishonest appropriation have been illustrated in the case of *Moynes v. Cooper* [1956] 1 Q.B. 439. This case, whilst it has clarified the law in certain respects, can only produce feelings of regret at the criminal policy which leaves the criminal law governing dishonest appropriation in its present state of senseless and technical distinctions, and as an unwieldy mass of offences unsuitable for the administration of criminal justice in modern society. The fault lies not with the judges, who must administer the law as it is, but with the legislature and Government, which seem to exhibit a total lack of interest in substantive criminal law reform. Indeed, were it not for the balanced approach of the judges, who administer the law so far as possible without letting the technicalities overcome their judgment, the need for reform would be more obvious. We must, however, examine *Moynes v. Cooper* as a matter of lawyers' law and as a clarification of legal uncertainties.

In *Moynes v. Cooper* the courts were once again concerned with the problems revolving round the requirements of "taking," "consent of the owner" and "intent at the time of taking," as now expressed in the definition of stealing in section 1 of the Larceny Act, 1916, in a situation where the property has been handed over under a mistake. The definition in section 1, so far as it is material, reads:— "(1) a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof," and in section 2 (i) "the expression 'takes' includes obtaining the possession . . . under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained." Although this definition now governs larceny, it is declaratory and must in all its particulars be read in the light of the common law cases to ascertain its meaning.

The facts of *Moynes v. Cooper* were that Moynes, a workman, received a wages packet from the firm's wages clerk which included £6 19s. 6½d. more than he was entitled to. The mistake happened because Moynes, without the knowledge of the wages clerk, had

already received that sum out of his week's wages as an advance. Moynes did not know of the mistake when he took the packet, but discovered the clerk's mistake only when he got home and opened the packet. He then decided to keep the money. The Divisional Court (Lord Goddard C.J. and Hilbery J., Stable J. dissenting) held that the workman was not guilty of larceny since at the time when he took the packet he did not know of the mistake, and therefore had no *animus furandi* at the time of taking. The interest of the decision lies in three points—

- (1) First the court stated that section 2 (1) (c) reproduces the effect of the decision in *R. v. Middleton* (1873) L.R. 2 C.C.R. 38 with regard to what may amount to a wrongful taking. In other words it settles that, where possession but not ownership is obtained as a result of a transfer made under a mistake known to the taker at the time, there is a sufficient "taking" for the purposes of larceny, notwithstanding that the transferor consented to the physical possession passing and intended to pass the ownership.
- (2) The decision of the Divisional Court does not go into the further question that it still will not be larceny, if, notwithstanding the mistake, the transaction is sufficient to pass the ownership of the chattel or money in question. Only a mistake sufficiently fundamental to prevent the passing of ownership will be operative in this connection, as is clearly recognised in *R. v. Middleton* which is the origin of this particular form of larceny. If ownership is transferred, the property is transferred with the consent of the owner and it will not be larceny. In this connection the Divisional Court said only that "The decision in *R. v. Prince* (1868) L.R. 1 C.C.R. 150 depended on the fact that the bank, acting through its authorised clerk, did intend to pass the property in the money, though it was induced to do so, not by its own or his mistake, but by fraud. Where a transfer of property is obtained by fraud, there is no doubt that the property does pass, subject, however, to the right of the defrauded party on discovering the fraud to disaffirm the transaction and resume his property. In the present case the action would be for money had and received to the company's use as paid under a mistake of fact." It is unfortunate that this branch of the criminal law should be complicated by difficult questions which may arise on the question of the passing of ownership, but in practice the courts are only likely to apply the doctrine in cases of

fundamental mistake as to the identity of the recipient, identity of subject-matter or the entire nature of the transaction.

- (3) The decision also recognises that for the purposes of "taking" in larceny the artificial notion that a person may not take possession for the purposes of larceny until he knows what he has got, as laid down in *R. v. Hudson* [1943] K.B. 458, is of limited application. *Moynes v. Cooper* limited the *Hudson* doctrine as follows: "*(R. v. Hudson)* is not an authority for the present case, as in *Hudson's* case neither the cheque nor the envelope was intended by the sender for the accused." It is at least clear that, where the transferor intends the very article in question to pass to the recipient and places it in the recipient's physical control, the recipient takes possession, and, unless the recipient has the fraudulent intent at that time, it will not be larceny. The case of *R. v. Ashwell* has been further doubted in the remarks of the Lord Chief Justice both in the argument and in his judgment in *Moynes v. Cooper*.

We must conclude by once again noting that the proposal of the Criminal Code Bill Commission, 1879, for amending the definition of larceny would end the difficulties in the first and third points above and would vastly improve the law and its administration. The Draft Code of the Commissioners defined theft to include "fraudulently and without colour of right taking or fraudulently and without colour of right converting to the use of any person anything capable of being stolen, with intent to deprive the owner permanently thereof." This definition has been the basis of the modification of the definition of theft in some of the states of Australia, in New Zealand, Canada, and in a number of the criminal codes of the Colonies. It has been tried and tested and has worked well. If it were combined with a reconsideration of the offence of fraudulent conversion, we could have intelligent and simple provisions governing dishonest appropriation. It is to be hoped that the Lord Chief Justice, with his vast experience of the technicalities of this branch of the law, will impress on the appropriate authorities the need for a reform which will make unnecessary his undoubtedly correct judicial statement in *Moynes v. Cooper*: "For these reasons, while the defendant was guilty of grave dishonesty, in our opinion he was not guilty of larceny, and in the present state of the law he was not guilty of any criminal offence."

A. LL. ARMITAGE.

CRIMINAL LAW—OBTAINING CREDIT BY FRAUD

THE decision of the Court of Criminal Appeal in *R. v. Ingram* [1956] 3 W.L.R. 309 is welcomed as a salutary reminder that in appropriate circumstances the limitations of the crime of obtaining chattels, money or valuable securities by false pretences arising from the rule that a statement of intention about future conduct is not a false pretence (see *R. v. Dent* and the note in [1956] C.L.J. 3) may be met by the charge of obtaining credit by fraud contrary to section 13 (1) of the Debtors Act, 1869. In *R. v. Ingram*, on facts similar to *R. v. Dent*, the court held that the accused was guilty of obtaining credit by fraud. The appellant, an electrician, obtained contracts from shopkeepers to erect or renovate electric signs and obtained from them part payment of the agreed price in advance. The jury found that in obtaining these payments he was acting fraudulently *from the beginning*, that is to say that at the time he negotiated the agreements and received the advanced payments he never had any intention to do the stipulated work. He was convicted on six charges of obtaining credit by fraud, and appealed to the Court of Criminal Appeal on the ground that, when he received the various payments in advance, he did not obtain credit within the meaning of the offence in the Debtors Act. His argument was that what he had to do in return for the money received was not to pay money in the future, but to do work, and that there could be no obtaining of credit unless the obligation towards the person who had given credit was to pay him money in the future. The court held that when section 13 (1) speaks of credit obtained in incurring any debt or liability it covers the case where credit is obtained in incurring any liability to render not only money but money's worth and that money or money's worth may include commodities or services. "In the present case the appellant received cash in advance. The liability he incurred was to render money's worth, that is services in the near future to the customer who paid him cash. In the meantime the customer trusted him to do the work. On these facts it is clear that he received credit and did so in incurring a liability within the meaning which the court has given that word. He obtained credit by fraud, and thus the offence under section 13 is complete."

This case strongly reinforces the argument as to the meaning of credit made by J. W. C. Turner in Appendix II to his (15th) edition of Kenny's *Outlines of Criminal Law*. Obtaining credit within the section means obtaining something on a promise to do something in the future in incurring a debt or a liability to pay money or money's worth, and money's worth includes goods or services. *Osborn v.*

Barton (1950) 66 T.L.R. 115, if it is to stand at all, can only stand as a case where on the facts the court regarded the money as having been paid for an immediate transfer, and it is submitted that it is now clear that when money is paid in advance for goods by a purchaser who gives the vendor time for delivery, *i.e.*, the delivery is to be made at some time in the future as part of the agreement, credit is obtained by the vendor. To establish the offence there must of course be clear evidence of fraud *at the time of obtaining the credit* and mere delay in paying a debt or doing work or delivering goods is not fraud.

We might add that, where an article has been transferred at an agreed value, and that value in the book-keeping meaning of the term is credited by the transferee to the transferor, it is not an obtaining of credit *of that amount* by the transferor within the offence under the Debtors Act (*R. v. Mitchell* (1955) 39 Cr.App.R. 49); that an obtaining of a loan of money on the faith of future repayment is an obtaining of credit (*R. v. Pryce* (1949) 34 Cr.App.R. 21, *cf. Herbert v. R.* (1941) 64 C.L.R. 461).

A. LL. ARMITAGE.

CRIMINAL LAW—JURISDICTION, CONSPIRACY AND
FRAUD ON THE CROWN

THREE recent cases illustrate the courts' reluctance to assist in the creation of new crimes.

In *R. v. Martin and Others* [1956] 2 W.L.R. 975 the accused were charged with being in possession of raw opium on a British aircraft flying from Bahrein to Singapore. Regulation 3 of the Dangerous Drugs Regulations, 1953, proscribes the unauthorised possession of such drugs in England, and it is enacted by the Civil Aviation Act, 1949, s. 62 that "any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

The prosecution argued that the effect of section 62 was that the accused, being in England, should be deemed to have possessed the opium in this country, thereby contravening the Regulation. In a characteristically closely reasoned judgment Devlin J. rejected this contention and quashed the indictment. The prosecution's contention meant in substance, he said, that section 62 operates to create offences, because the possession of opium abroad is not otherwise illegal by English law. But in truth the section simply deals with the question of venue, by providing that if what has taken place on

the aircraft is itself an offence, then the English courts have jurisdiction to try it. The prosecution's interpretation would have necessitated "a very free construction" of the words of the Act, a construction eminently unsuitable where new crimes may result.

It had been suggested in argument that, if section 62 were to bear the narrow meaning, then provided only one did not commit crimes such as murder, treachery, or bigamy which are expressly made punishable by statute wherever they are committed, one could conduct oneself with impunity on board British aircraft abroad. Devlin J. thought not. He drew a distinction between crimes conceived by the common law, which are not thought of as having territorial limits but as being universal offences, and those statutory offences "which are merely breaches of regulations made for the better order or government . . . of a particular country." Section 62 does not seek to universalise the latter.

What Lord Goddard C.J. described as "an exceptionally difficult point of criminal law hitherto undecided" arose in *R. v. Owen and Another* [1956] 3 W.L.R. 739. The appellants had in this country together made fraudulent representations, supported by forged documents, to the export control department of the German Federal Republic (known as Z.A.K.) to induce Z.A.K. to grant export licences for lead, steel and copper. The appellants had represented that the metal was to be used only in Eire; in fact they intended to sell it behind the "Iron Curtain." They were convicted, *inter alia*, of conspiracy to defraud Z.A.K. Their appeal against the conviction on this count was allowed; but an appeal by the prosecution to the House of Lords is pending.

The point at issue was whether a conspiracy in this country to commit a crime abroad is indictable here. The Court of Criminal Appeal considered that logically it could not be when, as in this case, the contemplated offence would not itself be a crime here. Only conspiracies to commit offences abroad which are themselves, exceptionally, crimes in English law wherever committed (such as murder and bigamy) should be indictable here. It is this doctrine which the prosecution will have to challenge in the House of Lords.

R. v. Hudson [1956] 2 W.L.R. 914 concerned a farmer who tried to avoid paying income tax. Instead of stating the amount of his profits in his annual income tax return this farmer had adopted the not unusual course of submitting his actual accounts and leaving the inspector to decide how much his return should show. He accompanied his accounts each year with a certificate stating that full disclosure had been made. Over a period of six years the accused had deliberately submitted false accounts with the intention of misleading the inspector and thereby defrauding the Crown. He

was charged with making false statements to the prejudice of the Crown and the public revenue with intent to defraud, and convicted. He appealed on the ground that he had not committed an offence known to the law. It was quite clear that neither the Income Tax Act, 1952, nor the Perjury Act, 1911, nor any other Act dealt with the point. But the Court of Criminal Appeal held that this was a common law misdemeanour.

Hawkins' *Pleas of the Crown* states quite categorically that "all frauds affecting the Crown and the public at large are indictable as cheats at common law." East's *Pleas of the Crown* is to the same effect. In *R. v. Bembridge* (1783) 22 St.Tr. 1 Lord Mansfield C.J. confirmed this: "a fraud or an imposition in a subject concerning the public which as between subject and subject could only be actionable by a civil action, yet as that concerns the King and the public (I use them as synonymous (*sic*) terms) it is indictable." This authority has never been questioned and the court therefore dismissed the appeal. "This is and always has been a common law offence," said Lord Goddard C.J., adding that in consequence "it is not necessary for this court to make a new offence." It is interesting to speculate whether in the absence of the above authorities the court would have been prepared to do so.

J. C. HALL.

WILLS AND INTESTACY—MURDER OF DECEASED—EFFECT OF EXCLUSION
OF MURDERER FROM BENEFIT

It is odd that, until 1956, no court in England had been called upon to determine the exact consequences of the application on an intestacy of the rule of public policy that no person may take a benefit arising out of a death brought about by murder (or manslaughter) committed by him. There was clear authority for the rule itself in *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147 (the Maybrick murder case), *In the Estate of Crippen* [1911] P. 108 (murder), *In the Estate of Hall, Hall v. Knight & Baxter* [1914] P. 1 (manslaughter) and *Beresford v. Royal Insurance Co., Ltd.* [1938] A.C. 586 (suicide). In *Cleaver* the Court of Appeal had held that a trust in favour of a wife, under a policy of life assurance taken out by her husband, failed on proof that she had murdered him, but that the policy moneys were to be paid to the husband's estate. In *Re Sigsworth, Bedford v. Bedford* [1935] Ch. 89 Clauson J. had expressly left open for further argument (which did not take place) the question whether the interest of a murderer, claiming on the intestacy of his victim,

should pass to the Crown as *bona vacantia*, or to the other persons entitled on intestacy under the Administration of Estates Act, 1925, as if the murderer were "struck out." It remained to Vaisey J. in *Re Callaway*, *Callaway v. Treasury Solicitor* [1956] 3 W.L.R. 257 to decide the point.

In *Callaway* a mother had made a will appointing her daughter sole executrix and leaving her the whole of her estate. The daughter killed the mother and her own child and then committed suicide. There was no evidence that she was insane. The daughter was undoubtedly precluded from taking any benefit under the mother's will, and letters of administration to the estate of the mother were granted to her son—her only child other than the daughter who had caused her death. The son applied by originating summons for a declaration that he was beneficially entitled to the estate to the exclusion of the Crown.

There were three possible solutions to the problem. First, that the application of the rule excluding the daughter should result in the transfer to the Crown of her interest under the will, and that such transfer should altogether exclude any intestacy or any rights arising under an intestacy. Secondly, that the will should be ignored, leaving the son and daughter as the persons *prima facie* entitled equally on intestacy; and the daughter being disqualified by her crime, that her half should go to the Crown. Thirdly, that the will being defeated and the daughter disqualified, the son should be regarded as the only member of the class entitled to take on intestacy and should accordingly take the whole estate. In the absence of authority, Vaisey J. would have preferred the first of these solutions—that the whole estate should pass to the Crown as *bona vacantia*. Why, he asked, should the daughter's crime endow the son even to the extent of half the estate? As her crime was against the Queen's Peace, why should not the Crown get the benefit from it? But if he could not have this solution (which was not, it seems, put forward by the Crown) then he would have accepted the second: the daughter's half to go to the Crown and the son to take the other half. For the son to take the whole would be "both illogical and unmeritorious," he thought, "for why . . . should he be the person to profit by his sister's crime and the consequent frustration of his mother's testamentary intentions?" It is not easy to follow his Lordship's objections. Forfeiture for felony was abolished in 1870. To allow the daughter to take the estate under the will and then to transfer it to the Crown is simply to apply a rule of forfeiture. And, on the point of the frustration of the mother's testamentary intentions, one is compelled to ask whether these would be less frustrated by giving the estate to the Crown

than by giving it to the son. Had the daughter predeceased her mother, leaving no issue surviving the mother, there would have been a lapse and the son would have taken the whole estate. Had the mother contemplated the possibility of her daughter killing her, to whom would she have wished her property to go? It is safe to answer that it would not have been the Crown. If there was no positive merit in the son, there was likewise no merit in the Crown except by a revival of the obsolete forfeiture rule. But despite his own firm views on the point Vaisey J. felt that the *Cleaver* case was an authority for saying that the rule in this country is that the interest of the criminal passes as if there had been a "lapse" or as if the wrongdoer is "struck out." He accordingly held that the daughter should not be reckoned or counted as a member of the class entitled on intestacy, and that the son, being treated as the only qualified member of the class, was beneficially entitled to the whole estate.

In *Callarway* the consequences of striking out the criminal were straightforward. In future cases they may well be difficult and complicated. Vaisey J. gave the example of a criminal entitled under his victim's will to a life interest with remainder to his own issue, so that the question might arise whether subsequently born issue of the struck-out wrongdoer would be excluded or not. Such cases will have to be dealt with as they arise, but the principle of striking-out seems sound. It is clearly in accordance with the remarks of Lord Esher in *Cleaver* that the doctrine of public policy ought not to be stretched beyond what is necessary for the protection of the public—that is, that the person who commits murder, or any person claiming under him or her, should not be allowed to benefit, and with those of Fry L.J. that while a crime may accelerate or beneficially affect the rights of third parties it should not prejudice or injuriously affect those rights.

F. J. ODGERS.

LEASE—RENT—REDDENDUM FOR PAYMENT EITHER IN GOLD STERLING
OR BANK OF ENGLAND NOTES TO EQUIVALENT VALUE

LANDLORDS may be among the prophets, economically speaking, as is shown by the facts of *Treseder-Griffin v. Co-operative Insurance Society, Ltd.* [1956] 2 Q.B. 127. In this case there had been a lease of two shops in Cardiff in 1938 for 99 years by which the tenants agreed to pay "yearly during the said term either in gold sterling or Bank of England notes to the equivalent value in gold sterling the rent of £1,900 . . . by equal quarterly payments . . ."

Up to 1953 the sum of £475 had been tendered and accepted quarterly, the lessors each time stating, however, their acceptance to be without prejudice to a claim to be paid in gold sterling or the equivalent in bank notes. The lease was then assigned to the defendants and the lessors sought to recover rent in the form of 475 gold sovereigns a quarter or rather their value in bank notes, payment in gold coins being impracticable in 1938 and since 1947 illegal. Lord Goddard C.J. decided in favour of the lessors at first instance ([1955] 3 W.L.R. 996) and declared them to be entitled to be paid each quarter bank notes sufficient in amount to buy gold coins of standard weight and fineness to the nominal value of £475. The benefit of this judgment to the lessors is apparent when it is calculated that, as at September 29, 1955, the value of 1,900 sovereigns as coins was £6,412 10s.

By a majority the Court of Appeal reversed this decision. The question for decision was, of course, one of construction and no question of law fell to be decided. The question itself is perhaps best formulated by Sir William Jowitt K.C. (as he then was) in *Feist v. Société Intercommunale Belge d'Electricité* [1934] A.C. 161 at p. 163: "Is the intention of those words to fix the amount to be paid, or to determine the manner in which an amount already fixed is to be discharged?" This question has often been before the courts in cases concerned with international agreements, but this instance seems to be the first where a gold clause has appeared in a dispute over a domestic contract. The novelty of it seems to have much influenced Denning L.J., who delivered the first judgment. He went so far as to express doubts as to the legality of such an undertaking in a domestic contract (citing sundry foreign prohibitions, but no English authority) and argued emphatically the inconvenience of "every creditor stipulating for payment according to the price of gold; and every debtor scanning the bullion market to find out how much he has to pay. What then is to become of sterling? It would become a discredited currency unable to look its enemy inflation in the face. That should not be allowed to happen." This approach to the problem can hardly be commended. It suggests setting aside contracts on novel grounds of public policy. Moreover, the common law has always recognised rents payable in kind, *e.g.*, corn, or rents tied to the value of minerals, and so has Parliament (see, *e.g.*, Settled Land Act, 1925, s. 45).

Both the learned Lord Justice and Morris L.J. were on safer ground in construing the *reddendum* in the lease to deal with the mode of discharging an ascertained debt, not with measuring the amount payable. Certainly on close consideration the wording of

the *reddendum* raises some difficulties for Lord Goddard's view. Thus the arrangement for equal payments does not stand well with an interpretation that allows the rent to fluctuate in value. Indeed fluctuation may result in a figure that includes shillings and pence, and, as Morris L.J. said, "it would not seem to be possible to pay the sum of 7s. 6d. in Bank of England notes." After rehearsing other objections to the construction of the *reddendum* as a genuine gold clause, Morris L.J. was of opinion that "there can be compliance with the terms of the lease if the word 'value' denotes nominal value, whereas difficulties and anomalies arise if the words of the *reddendum* are construed as denoting the selling price of sovereigns. Accordingly, I think that the *reddendum* should be regarded as fixing a rent of £1,900 and as defining or seeking to define the mode by which payment of £1,900 is to be made."

Harman J., on the other hand, agreed substantially with Lord Goddard. He preferred the view that the parties had endeavoured to introduce a genuine gold clause and that their language, though not impeccable, was apt to express their intention. Indeed if the parties meant anything by speaking of gold sterling in 1938, this must have been their intention. The fact that in 1938 the *reddendum* construed as a gold clause would have given a rent of over £3,300 appears at first sight inconsistent with the plain figure of £1,900 then inserted by the parties. But Harman J. pointed out that the lease in 1938 superseded an earlier one granted in 1932 from which the formula was copied, and in fact both then and later £1,900 was being accepted as a discharge. He therefore agreed in substance with Lord Goddard, though he thought the agreement referred to the intrinsic value of gold in a sovereign, not to the price required to buy one from an authorised dealer under the Exchange Control Act, 1947. Current prices of sovereigns reflect the resource of dealers who nowadays can sell sovereigns to oil sheiks for more than the value of the gold content. "It would indeed be a bizarre result that the liability of an English lessee under a lease of English land should be measured by the cupidity of the unknown ruler of an oasis near the Persian Gulf."

Leave to Appeal to the House of Lords has been granted and the question therefore remains open, the judges so far being equally divided. The minority judgment of Harman J. would seem to have the majority of the merits in this difficult case. Some of the contrary reasons, too, seem to put the cart before the horse. Denning L.J. insists in the course of an interesting historical argument that at common law a sovereign is worth one pound sterling, no more and no less, and cannot be given any other value as currency. But this is beside the point whether the parties

meant to refer to gold as currency or commodity. Again, section 6 of the Coinage Act, 1870, "makes it unlawful for a creditor to stipulate for payment of a money debt in any other way than in lawful currency." But this is relevant only if the reference to gold is taken to refer to a mode of discharge and not to a measure of liability. That is the question, and it is to be hoped that in answering it the House of Lords will follow the careful analysis of Morris L.J., or preferably that of Harman J., and not be swayed by considerations of economic policy. There are enough controls on freedom of contract without further restrictions by the courts on extra-legal grounds.

D. E. C. YALE.

PUBLIC RIGHTS OF WAY—RIGHTS OF WAY ACT, 1932

THE decision of the Court of Appeal in *Fairey v. Southampton C.C.* [1956] 3 W.L.R. 354 discloses an anomalous position under the Rights of Way Act, 1932. This statute performs for public rights of way a function similar to that of the Prescription Act, 1832, for private easements: it supplements the time-honoured methods of acquisition by grant, known in the case of public rights as dedication, and by common law prescription; it enacts that where a way has been actually enjoyed by the public as of right and without interruption for a period of twenty years, it shall be deemed to have been dedicated as a highway, unless there is proof of a contrary intention. Thus in addition to providing a new basis of acquisition, the Act reverses the burden of proof.

In the case under consideration, the public had, for more than twenty years before 1931, used a footpath across the land of D, the predecessor in title of F, as of right and without interruption, but there was no sufficient evidence of D's intention either to dedicate or not to dedicate the path as a highway. As the law stood in 1931, any claim by the public must have failed, as the onus of proof was upon them. In 1931 D began to turn back users of the path if they were not local residents. On July 12, 1932, the Rights of Way Act was passed, but its coming into force was postponed until January 1, 1934. This Act changed the burden of proof, where a way had been enjoyed as of right and without interruption for twenty years next before the time when the right had been brought into question. However, during the seventeen months before the coming into force of the Act, a landowner who brought an action denying the right would be governed by the old law: section 2 (1). From 1931 to 1953 D and later F told any users of the path other

than local residents that they had no right to be there. In 1953 F objected to the inclusion of the path as a public right of way in a map prepared under the National Parks and Access to the Countryside Act, 1949, and in 1955 he applied to Quarter Sessions under section 31 of the Act for a declaration that no such public right of way existed. The Court of Appeal, affirming decisions of the Divisional Court and Quarter Sessions, dismissed the application on the ground that the right had been called in question within section 1 (6) of the 1932 Act in 1931, that before that date the way had been enjoyed by the public for twenty years as of right and without interruption, and that this user established the claim under the Act, as the Act was retrospective and applied to a period of enjoyment that was wholly before the Act.

The court held that the operation of the Act was retrospective as this was the necessary implication from the savings clause, section 2 (1). The presumption that a retrospective intent is not to be inferred was thus rebutted, and the court did not find it necessary to mention the somewhat doubtful exception to the presumption—that a postponement clause is an indication that no further restriction on retrospective operation of a statute is intended: see *Craies Statute Law*, 5th ed., 363–364. The effect of the decision is, however, somewhat whimsical. The 1932 Act was rightly compared with the Prescription Act, 1832. The latter statute has never been considered an exemplary piece of draftsmanship, but it seems to have some advantages over the 1932 Act. The statutory period in the 1832 Act is that next before action brought, whereas in the 1932 Act the period is that next before the time when the right is brought into question. If, therefore, after twenty years' user by the public as of right and without interruption, a landowner has before 1932 challenged the right, but because of the submissive attitude of the public brings no action until after the 1932 Act has come into force, the right is perfected by the Act, unless the court holds that the acquiescence of the public in face of the landowner's challenge is sufficient proof that no dedication had ever been intended. (Perhaps the most curious feature of *Fairey's* case is that Quarter Sessions did not regard the submission of the public to the landowner's objections from 1931 to 1953 as proof of his case that the user had not been as of right.) If D had sued in 1931 or in 1932–1933 he would have succeeded, but after twenty-two years' acquiescence by the public in the landowner's denial of any public right, his claim is held to be without substance. This seems an extraordinary result, but is perhaps in consonance with the purpose of the 1932 Act which was probably to offset the tendency for such public rights to disappear. *Fairey's* case shows that the Act not

merely strengthens the hand of village Hampdens, but even confirms doubtful claims to public rights where there has been a general atmosphere of servility towards the action of a landowner in excluding the public from footpaths on his land. Many landowners consulted their solicitors on the effect of the 1932 Act, as is evidenced by the crop of notices negating any intention to dedicate a highway that sprang up. One wonders how many solicitors advised their clients that, while such a notice would be effective as regards future user by the public, the only effective method for a landowner to preserve his rights under the existing law as regards land already used by the public was to take legal proceedings within the seventeen months provided.

R. N. GOODERSON.

SETTLEMENTS AND TRUSTS FOR SALE—CAPITAL MONEY—REPAIRS

THE elaborate provisions of the Settled Land Act, 1925, designed to prevent tenants for life from spending capital money on repairs, have been unintentionally undermined, in the case of agricultural land, by the Agricultural Holdings Act, 1948. The breach has been exploited in a series of cases, starting with *Re Duke of Northumberland, decd.* [1951] Ch. 202. In an earlier note on this subject (1954 C.L.J. 63) it was suggested that delicate problems of income tax and maintenance claims might lie just round the corner, and it was asked whether a tenant for life could have the best of both worlds by directing repairs to be paid for out of capital and yet himself reaping the benefit of the income tax allowances. This very question has now been decided, with some difference of judicial opinion, in *Re Pelly's Will Trusts* [1956] 3 W.L.R. 26 (C.A.), though the issue lay between the tenant for life and the trustees rather than between the tenant for life and the Revenue. Another recent case, *Re Boston's Will Trusts* [1956] 2 W.L.R. 700, explores the question whether the tenant for life's new-found liberty to live on settled capital is to be adopted in the administration of trusts for sale. Both cases show how difficult it may be for those in fiduciary positions to hold the scales fairly between tenant for life and remainderman now that the equilibrium has been so rudely jolted by the Agricultural Holdings Act.

In *Re Pelly* the tenant for life, who was not impeachable for waste, had carried out agricultural repairs and had secured reimbursement out of capital money. He also obtained relief from income tax on the same expenditure, as being an outgoing chargeable against gross income. The trustees then raised the

question whether he was under a duty to refund all or any of this benefit. Wynn-Parry J. held that he ought to refund all of it, and that he was under a duty to claim the tax relief for this purpose. The Court of Appeal unanimously reversed this decision, holding that the tax relief was personal to the tenant for life and that he could not be made accountable for it.

It has already been noticed ([1954] C.L.J. 63) that the courts are showing a curious tendency to widen the new breach in the scheme of the Settled Land Act. *Re Pelly* adds a large bonus to the subsidy which the tenant for life can now take out of the remainderman's pocket: not merely does he save himself the cost of repairs by throwing it on to capital (which would leave him no better off than if he neglected to repair at all), but he is positively paid for doing so; so that the more repairs he does and charges to capital, the higher his income grows. Here indeed is an incentive to good estate management, which to some agricultural landlords must seem too good to be true. The tenant for life is in general required to act as trustee for all parties; but duty becomes a pleasure when the trustee can profit so handsomely by his trust. This fact was naturally put in the forefront of the argument against the tenant for life, which Wynn-Parry J. accepted. But the Court of Appeal unanimously rejected what Jenkins L.J. called "this deceptively simple line of reasoning." Both he and Evershed M.R. gave more weight to the point that the tenant for life was, by the trusts of the settlement, entitled to the whole of the income of the land, so that as much of this as could be rescued from the Treasury (by whatever means) was his by right. He was held to be no more accountable for his personal profit than if, for example, he had directed a change of investment which increased the rate of interest from 4 per cent. to 6 per cent. But it might be answered, with great respect, that when the tenant for life helps himself to capital money out of the pocket of the remainderman, Peter is being robbed to pay Paul; whereas a change from a less profitable to a more profitable investment is, other things being equal, robbing no one. A change from a prudent to an imprudent investment is, of course, a breach of the fiduciary duty.

In *Re Boston* the question was how far the *Northumberland* doctrine extended to trusts for sale, bearing in mind that trustees for sale are clothed with the Settled Land Act powers of both tenants for life and trustees for settlements. The trustees, who had spent considerable sums on repairs to agricultural property, discovered that these might be charged to capital, and were advised by counsel that they could themselves give the necessary directions (to themselves), subject only to obtaining surveyor's certificates as required

by the Settled Land Act. One of the trustees was also a contingent remainderman, and the court was now asked how far the trustees ought to act, and how far they were at liberty to sacrifice the remainderman's interests. Trustees for sale are torn by conflicting powers and duties, since they represent tenant for life and trustees rolled into one. Was their (tenant for life's) power to spend capital on repairs counterbalanced by their (trustees') duty to preserve the capital for the remaindermen?

To this question Vaisey J. returned a somewhat delphic answer. There must, he said, be a definite limit to the trustees' freedom to exercise the "tenant for life" powers, because they also had their "trustee" duty to preserve the trust capital. They were therefore in a different position from a tenant for life of settled land, who was entitled to think of himself first. The learned judge accordingly declared that the trustees had a duty to preserve capital, and ought not to exercise their power to spend it on repairs "without regard to such duty." But he also said that he did not think he could answer the question (which was asked by the summons) how the trustees' discretion should in fact be exercised, except that he did not see that it would be wrong for trustees to take into consideration such "personal elements" as the relative means of the parties, or benefits which they might have conferred on the settled property. This puts trustees for sale into a most invidious position: they have to decide whether to favour the tenant for life or the remainderman, in either case at the other's expense, and they are offered no guidance by the court except that they should consider "personal elements." Nor is the logic of the distinction between settlements and trusts for sale very easy to apprehend. As Vaisey J. himself said, "the powers of a tenant for life are fundamentally and essentially fiduciary," for he is expressly required by section 107 of the Settled Land Act, 1925, to "have regard to the interests of all parties entitled under the settlement," and "to have the duties and liabilities of a trustee for those parties." How can any trustees be in a more fiduciary position than that? If nevertheless the tenant for life can make his motto "number one," why should not the priorities be the same in administering trusts for sale? If they were, the trustees could at least tell what to do.

It would be more satisfactory if the tenant for life's fiduciary duty had been held to negative altogether his power to take advantage of the Agricultural Holdings Act by charging repairs to capital. But Vaisey J. inclined to the view that in 1948 the legislature actually intended to facilitate this. Once that is assumed (and it was the assumption which underlay the *Northumberland* case), there seems little to be gained by saying that the tenant for life is

a trustee and should "have regard" to interests which are in fact incompatible. The trust capital is either available to the tenant for life or it is not. To hold that he can take some of it, but not too much, can only create embarrassment and dissension. Lastly, it is surely permissible to doubt whether the rearrangement of the schedules to the Agricultural Holdings Act was ever intended to bring about what Harman J. has called "this revolution" in the law of settlements.

H. W. R. WADE.

REAL PROPERTY—TITLE IN EJECTMENT—POSSESSION

THE High Court of Australia, which has done so much to enrich the law, has in *Allen v. Roughley* [1956] 29 A.L.J. 603 provided a feast for connoisseurs of real property. Fundamental questions touching the nature of title to land are rarely raised, and gratitude is due to the High Court of Australia not only for a fascinating discussion of a deep and controversial topic, but also for their willingness to embark upon it when they were equally able to dispose of the case on narrower grounds. The point of interest was whether a title to land is founded by possession of it for less than the full period of limitation (which in New South Wales is still twenty years) as against a later possessor who has not himself ejected the plaintiff or succeeded in barring his title by limitation. It was this same question to which Holdsworth gave a negative answer in putting forward his remarkable account of the rise of a concept of "ownership" out of the action of ejectment. Holdsworth's account was refuted by Professor Hargreaves in a learned article ((1940) 56 L.Q.R. 376), which despite a counterblast from Holdsworth (*ibid.*, 479) may be said to have put the subject to rights. These authorities were referred to by the High Court of Australia, who also found this part of Holdsworth's great work a stumbling-block.

A simplified version of the facts is as follows. X had been in possession of the land from 1880 to 1895, but without an evident title. He then died, devising the land to his son for life with remainder to his other children. In fact, however, the defendant Allen took possession for his own benefit in 1898 and never gave it up; but in 1937 Allen became one of the trustees of X's will. The son died in 1942. In 1950 an action was begun which was, in effect, a claim by the children to recover from Allen the land of which he had been the ostensible owner for over fifty years. The action succeeded, and should give food for thought as to the security of shorter possessory titles. One ground on which the majority of the

court could have disposed of the case was that Allen, having accepted the trusteeship of X's will, could not throw the burden of proof of title on to his beneficiaries, as he could have done if he had been merely a stranger in possession: his possession was not that of an adverse claimant, but that of a trustee. Therefore Allen could succeed only if, admitting X's original title to be valid, he could then show that he had barred all the interests arising under the will. But on that footing he could not show that he had barred the children, for their right of action arose only in 1952. A further, but problematical, ground of decision mentioned by Fullagar and Taylor JJ. was that Allen all along knew of the trusts of the will, and was therefore subject to them on the principle established in *Re Nisbet & Potts' Contract* [1906] 1 Ch. 386.

But the momentous question, discussed both learnedly and luminously by the court, was whether Allen, if regarded as an ordinary adverse possessor, could resist the children's claim on the ground that X, having been only fifteen years in possession, had transmitted to them a weaker title than that of Allen, the later possessor. Holdsworth recognised that "this is a very fundamental question" (H.E.L. vii, 62) and he stated firmly that in the eighteenth and nineteenth centuries it became settled that nothing less than the full twenty years' possession would support an ejectment (*ibid.*, 64). This was one aspect of his account of the growth of a concept of "ownership," as opposed to the seisin on which titles were founded in the medieval law, and his assertion that a plaintiff in ejectment had to prove not merely a better title than the defendant, but an absolutely good title. In other words, the defendant could plead *jus tertii*; for unless there had been the full period of twenty years' possession, there would be an unextinguished right, a *jus tertii*, in someone else. Of course, Holdsworth's inferences were not wholly without authority, for there have been some waverings in the judicial dicta during the course of the centuries. But the paradoxical thing about the growth of "ownership" out of the action of ejectment, which Holdsworth describes so circumstantially, is not merely that it never occurred, but that it is the exact opposite of the truth. So far from throwing any greater burden upon plaintiffs seeking to recover land, the action of ejectment shifted the basis of title from the technical seisin of the medieval law to the simpler concept of adverse possession; for ejectment was itself an action of trespass which mere possession, without seisin, would found. Instead of developing towards "ownership," titles became more possessory than ever. The earlier possession founds the better title—and it does not matter how short it is, provided that it is truly adverse possession. Today it is only

necessary to point to *Asher v. Whitlock* (1865) L.R. 1 Q.B.1 (a case very like *Allen v. Roughley*) and *Perry v. Clissold* [1907] A.C. 73, but there is plenty of older authority too to show that "the medieval principles of relativity of titles" have never ceased to run strongly through the law.

Much of this authority was discussed in the High Court of Australia. The judgments are a mine of pertinent remarks and citations, which it is impossible to summarise. Dixon C.J. and Fullagar J. felt constrained to differ from Holdsworth's propositions; Williams and Kitto JJ. escaped from them by confining them to special cases—as for example where the plaintiff previously abandoned the land—and it is fair to say that they too were convinced that as general propositions they were insupportable. Holdsworth himself had to make important reservations in his theory, for by itself it would have justified anyone in helping himself to his neighbour's land if he could find a flaw in his neighbour's title. He therefore said that "ownership" did not have to be shown where the defendant had trespassed upon the plaintiff (H.E.L. vii, 59, 65). But ejectment was itself an action of trespass: the whole question was who was trespassing, and to start by calling one party a trespasser pre-judges the argument fatally. An action to recover land is still merely an action in tort (see *Bramwell v. Bramwell* [1942] 1 K.B. 370) and it cannot be approached with an assumption that one party is the wrongdoer. As to *jus tertii*, it is obvious that if the plaintiff cannot rely on his own possession, the *documentary* part of his title must be absolutely good—if for example he claims (as in the present case) under an earlier possessor's will, it is open to the defendant in possession to show that the will is invalid, or to pick any other hole in it that he can. To that extent he can defend his own possession by showing that the true title is in someone other than the plaintiff. But *possession itself* is a fundamentally different thing from the paper title by which the benefit of other people's prior possession is claimed. The one is the anchor, the other is the chain. *Jus tertii* means a weak link in the chain. But that will not dislodge the anchor itself, *i.e.*, the title conferred by actual prior possession, however short.

H. W. R. WADE.

LIABILITY FOR INDEPENDENT CONTRACTORS

GLANVILLE WILLIAMS

ONE of the most disturbing features of the law of tort in recent years is the way in which the courts have extended, seemingly without any reference to considerations of policy, the liability for independent contractors. An independent contractor may be defined for the present purpose as any person, other than a servant, who is employed to do work. The definition includes such diverse persons as a builder, a road construction engineer, an electrician, a dentist or doctor attending a private patient, a shoe-repairer, a launderer, a dressmaker, a barber, an airline company, a taxi-driver, a copy-typist, an advisory expert,¹ and a charwoman if not a servant.² But a vendor is clearly not a contractor for this purpose (so that if, for example, I order a particular type of gunpowder to be made for me as a purchaser, I am not to be regarded as an employer of an independent contractor, and will not be liable, if the seller's works blow up, under any of the heads of liability to be discussed presently). Similarly it is submitted that a landlord who covenants to repair is not an independent contractor for the tenant; hence such rules of liability for contractors as have been developed would not apply to the tenant.³ The landlord would be an independent contractor for the law of tort only if it were contemplated that he was to do the repairs himself or by his servants.

THE DOCTRINE OF NONDELEGABLE DUTY

Traditionally, servants are distinguished from independent contractors because there is supposed to be no general principle of vicarious liability for the torts of the latter. There must be some limit to the doctrine of vicarious liability, and during the nineteenth century it was generally confined to the masters of servants and partners. There were, however, a few cases which sowed the seeds of the large extension that has since taken place. Prominent among these was *Dalton v. Angus*,⁴ where Lord Blackburn uttered

¹ *The Pass of Ballater* [1942] P. 112.

² *Woodward v. Mayor of Hastings* [1945] 1 K.B. 174 (C.A.).

³ See also *Hobson v. Bartram & Sons, Ltd.* [1950] 1 All E.R. 412 (C.A.) (purchaser of ship who is on board during test is not a contractor for whose act vendor is liable).

⁴ (1881) 6 App.Cas. 740 at 829.

his much-quoted remark that "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor." This dictum, if literally applied, would create vicarious responsibility for any and every act of negligence performed by an independent contractor in the course of doing the work. It would efface the whole distinction between a servant and a contractor. Lord Blackburn presumably did not intend to go so far as this, so that his doctrine of the nondelegability of the legal duty cannot have been intended to apply to every duty. He did not, however, say to which duties it did apply. The use made of the dictum in later cases has advanced it to the rank of one of the leading sophistries in the law of tort. Since the judge is left to determine, within the limits of precedent, whether a particular duty is delegable or not, the dictum gives him freedom to decide the case as he wishes, while presenting him with a verbal "reason" that conceals his real motivation; and sometimes perhaps it operates as a hypnotic formula inducing the judge to think that he is required to reach a particular conclusion when in fact he is not.

Lord Watson in the same case stated a narrower principle: he thought that vicarious responsibility applied only when the work contracted for was necessarily attended with risk. This is a slightly clearer pointer than Lord Blackburn's; the trouble is that every undertaking can be regarded as necessarily attended with risk, because there is always the risk of negligence.⁵ Evidently the reference is to some unusually high risk. But can the rule even in this form be regarded as sufficiently precise for legal purposes?

The way in which Lord Blackburn's rule of nondelegable duty begs the question is well illustrated by *Pickard v. Smith* (1861).⁶ The defendant occupied a refreshment room and coal cellar on a railway station, and employed a coal merchant to discharge coal into the cellar. While the trap door was raised, a passenger by the railway fell into the cellar. It was held that the defendant

⁵ Lord Watson's words were: "When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions": 6 App.Cas. at 831. It will be seen on close scrutiny that this passage points a false opposition. The fallacious mode of statement goes back to the judgment of Cockburn C.J. in *Bower v. Peate* (1876) 1 Q.B.D. 321 at 326: "There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

⁶ 10 C.B.(N.S.) 470.

was liable. The judgment most frequently quoted is that of Williams J. He begins by stating some propositions in unchallengeable terms, including the general principle that "if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable." This principle is then said to be "inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." These remarks are again plainly correct if they mean that responsibility is imposed upon one who expressly authorises an independent contractor to commit an act that is in law a tort, and upon one who delegates to a contractor the performance of a positive duty incumbent upon himself, where the contractor fails to perform the duty and either the duty was a strict one or (if it was merely a duty upon the defendant to use care) the defendant has been negligent in omitting to see that the contractor actually performed the act.

There follows, however, the passage that, it is submitted, contains a fallacy. Williams J. said—

"Now, in the present case, the defendant employed the coal merchant to open the trap in order to put in the coals, and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it furnishes no excuse, either in good sense or law."

This reads well enough till the last sentence, for until then all that is stated is that "the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief." But in the last sentence the learned judge goes on to say: "The performance of this duty he omitted." "This duty" clearly refers to the obligation stated in the previous sentence "to take reasonable means to prevent mischief," *i.e.*, to an ordinary duty of care. The defendant had employed a contractor to open the trap, and presumably to close it as well. It is difficult to see what there was in this to indicate negligence, unless the choice of contractor was in some way improper, of which there is nothing in the report.

The concluding clause says that the contractor "also" neglected the duty, as much as to say that the defendant himself neglected it. But the defendant did not neglect it unless it was an absolute duty to see that the trap door was shut. If the conclusion was that he was under an absolute duty, then the judgment is open to the objection of illegitimately passing from a duty of care in the premise to an absolute duty in the conclusion. But if the duty was, as stated, simply a duty to take reasonable means to prevent mischief, the assertion that the defendant neglected his duty was without foundation in the evidence.

The objection to the judgment of Williams J. may be put in another way by saying that it confuses personal with vicarious liability. The law is now settled that where a person who is under a duty of care entrusts the performance of the duty to an apparently competent contractor, he is not generally (so far as his own duty of care goes) under a duty to check the contractor's work, being entitled to rely upon its proper performance.⁷ This is particularly obvious where the propriety of the work can only be ascertained by an expert, for otherwise the duty to employ experts would be one of infinite regress.⁸ Thus where a person employs an apparently competent contractor, his liability is vicarious or nothing. In the absence of something to put him on inquiry as to some danger created by the contractor, he is not (as Williams J. says he is) "bound to take reasonable means to prevent mischief." If, on the other hand, these words were intended to refer not to a personal duty of care but to vicarious liability for contractors they are open to the objection of introducing a fictitious formula, because personal fault is irrelevant to vicarious liability.

There is a similar objection to the language of nondelegable duty. If every duty of care were regarded as nondelegable, the proposition that there is liability for contractors when the duty is nondelegable might be regarded as a comparatively harmless pleonasm. The worst that could be said against it from the logical point of view would be that, by purporting to give a reason for the liability which is in fact not a reason, it conceals the absence of a real reason. However, the fact is that some duties of care are regarded as delegable, in the sense that they are regarded as fulfilled if the performance of them is delegated to an apparently

⁷ See *Stennett v. Hancock* [1939] 2 All E.R. 578.

⁸ Cf. *Clelland v. Lloyd Ltd.* [1938] 1 K.B. at 276 (C.A.); *Canter v. Gardner & Co.* [1940] 1 All E.R. 325. *Woodward v. Mayor of Hastings* [1945] 1 K.B. 174 (C.A.) may be explained on the ground that the "contractor" there was a menial servant who needed responsible supervision; in any case the liability of an occupier, there considered, has since been extended to embrace vicarious responsibility for contractors.

competent contractor. For instance, a person who carries goods on the public highway is under a duty of care not to injure third parties in carrying them; but he may delegate the carriage to a carrier for whom he will not be vicariously liable. Similarly, the duty under *Donoghue v. Stevenson*⁹ may be delegated.¹⁰ The owner of a motor-vehicle who has it repaired is not vicariously liable if, owing to bad repair, a third person is injured.¹¹ (Indeed, so far from this particular duty being nondelegable, it would be negligent for an unskilled person to try to do it himself.) These illustrations are enough to show that it is never a reason for a decision to assert, with Lord Blackburn, that a person cannot escape from the responsibility of seeing a duty performed by delegating it to a contractor. Such an assertion is simply an assumption of what is to be proved. Yet it is on this assertion that liability for contractors has usually been predicated.

The doctrine of nondelegable duty is sometimes found outside the law of liability for contractors. It appears to have been used by Denning L.J. to explain the vicarious liability of hospitals for the negligence of surgeons.¹² The general view, however, is that this responsibility is to be attributed to the law of master and servant. It seems that Denning L.J. himself regards the surgeon as a servant of the hospital, so that the reference to nondelegable duties is really unnecessary.

A new and curious application of the doctrine of nondelegable duty was made by the House of Lords in *Stavely Iron & Chemical Co., Ltd. v. Jones*.¹³ It was said, *obiter*, that where a duty is personal or nondelegable, the act of the subordinate (servant or contractor) is attributed to the employer as the employer's own act; but where the duty is delegable the employer is not liable unless the subordinate is himself guilty of tort. This distinction creates its own set of difficulties which have been examined elsewhere.¹⁴

⁹ [1932] A.C. 562.

¹⁰ Of course, the language of delegable and nondelegable duties is merely one way of referring to duties in respect of which there is not or is liability for an independent contractor engaged to perform them. Strictly speaking, no duty in tort is delegable; the point about the duty under *Donoghue v. Stevenson* is not that the duty can be delegated but that its performance can be delegated in such a way that the person under the duty is not responsible for a default in performance. In short, he performs his duty by delegating it to an apparently proper contractor.

¹¹ *Phillips v. Britannia, etc., Co.* [1923] 1 K.B. 539, *affd.* [1923] 2 K.B. 832 (C.A.); *Malfrout v. Nozal* (1935) 51 T.L.R. 551; *Stennett v. Hancock* [1939] 2 All E.R. 578; *Herschthal v. Stewart & Ardern* [1940] 1 K.B. 155; *cf.* *Haseldine v. Daw* [1941] 2 K.B. 343 (C.A.).

¹² *Cassidy v. Ministry of Health* [1951] 2 K.B. 343 (C.A.).

¹³ [1955] 2 W.L.R. 479 at 482, 491.

¹⁴ (1956) 72 L.Q.R. 522.

THE EXTENT OF LIABILITY FOR CONTRACTORS

If the doctrine of nondelegable duty is no reason for, or even limitation of, vicarious liability for contractors, the jurist is faced with the task of finding some rule underlying a series of decisions when no such rule was expressed in them. Most of the nineteenth-century cases can be restrictively explained as turning on the creation of dangers in the highway, and with the aid of a little imagination *Pickard v. Smith* (above) can be explained as an extension of these cases to the railway platform as a quasi-highway. Yet even this explanation, though perhaps the best that can be done, leaves the law fundamentally incomprehensible. Almost the greatest danger that can be created on the highway is to drive an automobile along it; yet there is no vicarious liability for the negligence of a contractor in his manner of driving. Were it otherwise, a person who posted a letter would be liable for the negligent driving of the Post Office employee who is carrying the letter; and the passengers on a bus would be vicariously liable for their driver. Thus the rule relating to dangers on the highway must be arbitrarily limited to dangers of some degree of permanence. (But even if the bus or Post Office van were habitually driven with improper brakes there would be no vicarious liability of this kind.)

Some cases can be explained as turning on strict liability, particularly where the duty is a statutory one.¹⁵ *Hardaker v. Idle District Council*¹⁶ can perhaps be put as an instance of a common-law duty of care imposed upon the exercise of statutory powers—though why the fact that statutory powers are being exercised should make the common-law duty of care a non-delegable one is totally inexplicable. Perhaps a better explanation is that the work for which the contractor was commissioned was regarded as exceptionally hazardous.¹⁷ This is not, however, the way in which the law is currently interpreted. In *Darling v. Att.-Gen.*,¹⁸ the facts were that the Ministry of Fuel and Power entered the plaintiff's land under statutory power to make boreholes and look for coal; the Ministry's contractors negligently left a heap of timber on the land, and the plaintiff's horse was injured. Morris J. held that the Ministry was liable for the contractors: the

¹⁵ Cf. *Mulready v. J. H. & W. Bell, Ltd.* [1953] 2 Q.B. 117 (C.A.). Strict liability naturally involves liability for contractors, but the converse is not true. Where a defendant is only liable for an independent contractor, and the case is not one of strict liability, the defendant will go quit if the contractor was not negligent: *Canter v. Gardner & Co.* [1940] 1 All E.R. 325.

¹⁶ [1896] 1 Q.B. 335 (C.A.).

¹⁷ See *per* A. L. Smith L.J. at p. 346, quoting Lord Watson's dictum in *Dalton v. Angus*, cited previously.

¹⁸ [1950] 2 All E.R. 793.

exercise of the statutory power created a duty not to cause unnecessary danger, and this was nondelegable within the rule in *Dalton v. Angus*. The learned judge did not rest his judgment on the exceptionally hazardous nature of the undertaking, and indeed a heap of timber could hardly be regarded as carrying unusual danger. Certainly it is much less dangerous than a lorry with a defectively secured wheel; yet in respect of the latter there is no vicarious liability for contractors. The truth seems to be that the cases are decided on no rational grounds, but depend merely on whether the judge is attracted by the language of nondelegable duty.

Irrespective of statutory power or duty, there is now vicarious liability wherever a contractor is employed to perform what Slessor L.J. in *Honeywill & Stein v. Larkin Bros.*¹⁹ called "extra-hazardous or dangerous operations." The liability was held in that case to exist where a photographer was employed to take a flashlight picture in a theatre, the magnesium flash causing a fire in which the theatre suffered damage. It seems rather remarkable to regard the taking of an indoor photograph, even with magnesium powder, as "extra-hazardous or dangerous"; of course it would be dangerous if performed negligently, but is that fact sufficient to create liability for contractors? The equation of "extra-hazardous" and "dangerous" is also worthy of remark. One would think that "hazardous" and "dangerous" are synonyms; if so, "extra-hazardous" must mean something specially dangerous. Even if one goes so far as to say that the use of flashlight powder is "dangerous," it is hyperbolic to describe it as "extra-hazardous." If this is extra-hazardous, we are left with no language to describe really dangerous conduct.

The result of the decision in *Honeywill & Stein v. Larkin Bros.* may well be to cause grave hardship. The owner of the theatre was almost certainly insured against fire, so that if there had been no doctrine of liability for contractors the insurance company would have had to stand the loss, subject to a claim for indemnity against the careless photographer. With the doctrine, however, the insurance company is given an extra right of recourse against a person who is morally innocent, namely the person who engaged the photographer, which may well bring about his ruin. It seems not unreasonable to require that such a rule of law should receive some consideration and justification; yet in *Honeywill & Stein v. Larkin Bros.* it receives none.²⁰

¹⁹ [1934] 1 K.B. 191 (C.A.); cf. *The Pass of Ballater* [1942] 2 K.B. 102.

²⁰ It should be said that no hardship was caused by the decision on the actual facts. The employer of the contractor had paid the damages to the owner of

It has been ruled that there is vicarious responsibility for contractors in all cases of nuisance.²¹ This, if correct, explains the highway cases; but it is subject to the difficult distinction between negligence in what the contractor is employed to do and "casual" or "collateral" negligence. This distinction, indeed, applies to all cases of vicarious liability for contractors.

As recently as 1941 the Court of Appeal held that the duty of an occupier to an invitee did not carry vicarious liability for a contractor.²² Shortly before, Luxmoore L.J. had expressed a contrary opinion, following a view expressed by Pollock and the question-begging judgment of Williams J. in *Pickard v. Smith*. The opinion of Luxmoore L.J. was approved by Lord Simon L.C. and Lord Wright in *Thomson v. Cremin*, a decision of the House of Lords in 1941,²³ a few months after *Haseldine v. Daw*, so that it seems now to represent the law. Luxmoore L.J. expressed no reason of policy, but Winfield, approving the rule of vicarious liability, based it on the hardship to the injured invitee if he were left without remedy because the accident was due to the negligence of an independent contractor.²⁴ The short answer is, of course, that in the ordinary case the invitee would not be without remedy: he would have a remedy against the contractor. The liability of the occupier is of value to the invitee only when the contractor is unable to pay the damages. In order to give the invitee protection in this rather unusual case, he is allowed to bring in the occupier in every case, thus adding to the social cost of the incident by extending the number of persons involved in it.

The law on this subject is still not altogether clear, because of the doubt as to the present status of *Haseldine v. Daw*. The Law Reform Committee expressed the opinion that the House of Lords might well hold that facts like those in *Haseldine v. Daw* were an

the theatre and sought an indemnity against the contractor, which the court gave him. It would have been sufficient for the decision to say merely that the plaintiff having paid by way of reasonable compromise was entitled to the indemnity, the contractor clearly being liable to the owner of the theatre. As the case was decided, however, it becomes an authority for the proposition that the employer of the contractor is liable for him where the contractor is insolvent, so that the right of indemnity is worthless.

²¹ *Matania v. Nat. Prov. Bank, Ltd.* [1936] 2 All E.R. 633; *Spicer v. Smees* [1946] 1 All E.R. 489. The principle may explain the controverted decision in *Tarry v. Ashton* (1876) 1 Q.B.D. 314, which, though a case of a danger in the highway, was one where the danger was not created but "permitted."

²² *Haseldine v. Daw & Son, Ltd.* [1941] 2 K.B. 343 (C.A.). Cf. *Woodward v. Mayor of Hastings* [1945] 1 K.B. 174 (C.A.). The contrary decision in *Grote v. Chester and Holyhead Ry.* (1848) 2 Ex. 251 had dropped out of legal currency.

²³ The case was first reported in (1941) 71 Ll.L.R. 1, where it attracted no attention; it was later rediscovered in the Lords Journal by Mr. Heuston in preparing the 11th edition of Salmond on *Torts*, and consequently reported in [1953] 2 All E.R. 1185 and [1956] 1 W.L.R. 103.

²⁴ (1941) 57 L.Q.R. 306.

exception to the rule in *Thomson v. Cremin*.²⁵ But the Committee did not state the line of demarcation it had in mind. Perhaps it was the same as that drawn by Parker J. in *Bloomstein v. Railway Executive* (1952).²⁶ This decision, although rendered before *Thomson v. Cremin* had become generally known, showed an inclination to construe *Haseldine v. Daw* restrictively. Parker J. held that the rule in *Haseldine v. Daw* was that the occupier's duty of care to invitees may be performed by delegating to an apparently competent contractor if the occupier has to rely upon the contractor's technical knowledge; but this does not apply if no special knowledge is involved. In the case at bar, the contractor had left a bolt sticking up above the surface of the pathway at a railway station, and this was obvious to all concerned; the learned judge accordingly held that failure to level it was negligence on the part of the Railway Executive. It is not clear from the judgment whether the Executive was regarded as being guilty of personal negligence (being in breach of a personal duty to supervise the work of the contractor or to inspect its premises) or as being vicariously liable for the negligence of the contractor. If the former, it is not easy to see why the employer of an apparently responsible contractor should be under an obligation to check his work, even where the check does not require special knowledge. Negligence is failure to observe the standard of the reasonable man; and it is submitted that a reasonable man who has employed an apparently responsible contractor to do work will not regard himself as bound to check the work. The Railway Executive is, indeed, under a duty to inspect the public part of its premises regularly to see that it is not dangerous; and for breach of this duty the Executive could properly be held liable in negligence. But the judgment does not state how long the offending bolt had been there, or what opportunity the Executive had (through its servants) of finding the bolt. Doubtless it would have been very easy to find facts against the Executive; but the judge did not seem to think it necessary to go into this question, to which the issue of the contractor's negligence was irrelevant.

Even if, as Parker J. thought, the occupier's liability for contractors is confined to those who may be called non-expert contractors—that is to say, contractors who perform work which it is within the competence of the employer to supervise—this restriction on liability is not found in other parts of the law. In the flash photography case, *Honeywill & Stein v. Larkin Bros.*, the photographer was presumably specially skilled in the use of

²⁵ Third Report (Cmd. 9305 of 1955), p. 14.

²⁶ [1952] 2 All E.R. 418.

magnesium for photography. It was surely for him to judge the safe amount having regard to the proximity of inflammable material, and there was no particular reason for the employer even to be present. Yet the employer was held liable for the negligence of the photographer. This variation in the extent of liability for contractors in different torts, if such indeed be the position, adds oppressively to the complexity of the law.

The occupier's liability for contractors might have been good sense at the time when it was doubtful how far the contractor was himself liable to third parties. In *Francis v. Cockrell* (1870)²⁷ Martin B. said that one who employed a contractor to erect a grandstand was liable for any defect in the stand if the contractor faithfully carried out the specification, because the contractor himself would not be liable. This is simple common sense and is clearly the law; but in such a case there would be personal negligence on the part of the employer in having an insufficient stand built, and there would be no negligence on the part of the contractor. But if the contractor departs from the specification and builds negligently, the weight of authority holds him liable even to third parties.²⁸ In such circumstances the case for imposing liability on the occupier is much weaker.

It is not clear whether the Occupiers' Liability Bill now before Parliament would remove the occupier's vicarious liability for contractors. While it lays down that the occupier is under a "common duty of care," it does not state whether this duty is "delegable" or not. Even under the present law, the occupier's duty is regarded as being merely one of care, in the sense that it is not absolute or strict. Thus Viscount Simon said that "the fact that the work that was being carried on was of a kind which requires special care is a reason why the standard of care should be high, but there is no reason for saying that the occupier is liable for resulting damage to an invitee without any proof of negligence at all."²⁹ This kind of statement is misleading to the uninitiated, because it seems on its face to require real negligence on the part of the occupier, whereas by a legal fiction he is saddled with the negligence of his contractor. Whether, if the Occupiers' Liability Bill becomes law, the courts will continue to use this fiction in the interpretation of the measure remains to be seen.

²⁷ L.R. 5 Q.B. at 510.

²⁸ e.g., *Buckland v. Guildford Gas Light & Coke Co.* [1949] 1 K.B. 410; *Davis v. St. Mary's Demolition, etc. Co., Ltd.* [1954] 1 W.L.R. 592. The decision *contra* in *Ball v. L.C.C.* [1949] 2 K.B. 159 (C.A.) is unlikely to control the future course of decisions; see *Riden v. Billings & Sons, Ltd.* [1956] 3 W.L.R. 704.

²⁹ *Read v. J. Lyons & Co., Ltd.* [1947] A.C. 156.

It seems that the vicarious liability for contractors does not extend in favour of licensees.³⁰ On the other hand, the duty of a master to provide proper staff, premises, plant and system of work in favour of employees is held to be nondelegable, whether to another servant or to a contractor. This rule is the result of a curious twist in legal development. In the days of the doctrine of common employment, the judges for reasons of policy carved an exception out of that doctrine in respect of the duty to provide proper staff, etc. In order to give a semblance of consistency to the law, it was said that the master's responsibility in such a case was not vicarious (because to that common employment would have been a defence) but personal. He was under a personal duty to his servants to provide proper staff, premises and so on; and this duty was "nondelegable," so that if a servant was guilty of some negligence causing the staff, premises, plant or system of work to be improper, the master automatically became in default. This was a typical piece of judicial legislation, designed to mitigate the mischief of the doctrine of common employment. It reached the desired result by devious reasoning and the fictitious use of language. It also raised an abstruse problem on the doctrine of course of employment. Suppose that one servant by a negligent act outside the course of his employment caused the premises or plant to become unsafe, so that a fellow-servant was injured: would the master be regarded as in breach of his personal and nondelegable duty? From an objective point of view there would clearly be a breach of the duty to provide safe premises and plant; on the other hand, the doctrine of personal duty was intended to qualify only the common employment rule, not the scope of employment rule. The solution of the dilemma was as follows. The personal duty of the master to provide proper premises and plant was still only a duty of care, not a strict duty. He was not liable for the default of a stranger, or of a servant outside the course of the employment, if he himself was not otherwise in default. The reason why he was liable for the default of a servant in the course of the employment was that in such circumstances the *act* of the servant was imputed to him as his personal act. This was regarded as something different from vicarious liability, where the *tort* of the servant was imputed to the master. Both the imputed act doctrine and the imputed tort doctrine were subject to the doctrine of course of employment, but whereas the second resulted in

³⁰ *Morgan v. Girls' Friendly Society* [1949] 1 All E.R. 404; *Haseldine v. Daw*, above. But it probably extends in favour of the occupier's "contractees."

vicarious liability, the first (according to this line of authority) resulted in what was thought of as a breach of personal duty.³¹

It will be seen that the doctrine of nondelegable duty was here ~~used~~ used for a very special purpose, and it had nothing to do with the law of independent contractors. In the leading case on the subject, *Wilsons & Clyde Coal Co. v. English*, Lord Wright said that the obligation of employers in respect of plant, staff and system of work "is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill."³² This formulation limits the rule to delegations to employees. There was no need to extend it further, when the whole object of the new rule was to make a breach in the fellow-servant doctrine. However, the use of the language of nondelegable duty was reminiscent of the cases relating to independent contractors, and so the next year Goddard L.J., sitting as an additional judge of the King's Bench Division, held that the master's duty in respect of safe premises, etc., extended to the default of an independent contractor.³³

With the abolition of the doctrine of common employment the special rule in *Wilsons & Clyde Coal Co. v. English* is no longer needed in the circumstances that gave it birth. But it still yields liability for contractors, and it still makes the master liable in negligence in respect of the default of a servant where the servant is himself not liable in tort.³⁴ The perpetuation of the special rule, which has the effect of extending the employer's liability, may be justified on the ground that it is desirable to compensate employees for industrial injuries. But the basic compensation for industrial injuries is provided by national insurance, and the employer is supposed to be liable in tort only when he (or someone for whom he is responsible) has been guilty of a wrong. It is insisted that the employer's common-law duty in respect of safe premises, etc., is not absolute but is a duty to use care. This being so, it is not easy to see why the employer should be liable in tort where he has used every care to employ a responsible contractor. To extend too widely the class of persons for whom the employer is responsible would contradict the basic assumption that the duty is one of care,

³¹ The above statement represents the majority view in *Wilsons & Clyde Coal Co. v. English* [1938] A.C. 57. But Lord Macmillan, at p. 75, regarded the master's liability as vicarious. His opinion must now be taken subject to the remarks in the *Staveley* case, below.

³² [1938] A.C. 57 at 78. The first of Lord Wright's two statements was reaffirmed in *Rands v. McNeil* [1955] 1 Q.B. 253 (C.A.).

³³ *Paine v. Colne Valley Electricity Supply Co., Ltd.* [1938] 4 All E.R. 803 at 807. Yet see *Szumczyk v. Associated Tunnelling Co., Ltd.* [1956] 1 W.L.R. 98, from which it appears that the master may not be liable if he has reasonably relied on the advice of an expert.

³⁴ *Staveley Iron & Chemical Co., Ltd. v. Jones* [1956] 2 W.L.R. 479 at 482, 491.

and it would render unintelligible the distinction between tort liability and national insurance.

In passing, reference may be made to a strange piece of terminology which has resulted from the historical development. In order to exclude the doctrine of common employment in respect of the master's duty to provide safe premises, it was held that this duty of the master was "personal," and that his liability was also "personal" as distinct from "vicarious." This use of the term "personal" has survived, so that it is said that the employer of a servant or contractor who behaves negligently is, though not himself negligent, guilty of "personal" negligence.³⁵ The expression is a most misleading one, because in ordinary language a statement that X is personally negligent means that X is negligent in his own conduct. In reality the negligence of the employer in the case put is imputed negligence, not personal negligence.

Surveying these various instances of liability for contractors, it may be said generally that the law is quite unduly difficult to apply, and divided against itself without any reason. The concept of "extra-hazardous acts" is not a suitable one for legal rules; the distinction between delegable and nondelegable duties means that the whole law of negligence must be covered by specific judicial decision (often with changes of the judicial mind) before the extent of liability can be stated; and the exception for casual negligence needs much clarification before it can form the basis of prediction of judicial decision.

It is perhaps too much to expect legislation to be passed to clarify this part of the law of tort, but the hope may be expressed that the whole question of liability for contractors will be reconsidered by the House of Lords, which appears to be free to reverse the current trend of bringing the largest possible number of defendants before the courts. There is an interesting and neglected pronouncement of two members of the House in *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (1921).³⁶ Lords Buckmaster and Parmoor there distinguished two of the nineteenth-century cases on liability for contractors (*Pickard v. Smith* and *Penny v. Wimbledon U.D.C.*³⁷) practically out of existence, and Lord Buckmaster expressly said that even one who contracts to manufacture munitions, which in itself involves the possibility of explosion, can displace his liability by introducing an independent contractor. It is unfortunate that these remarks were not cited to the Court of Appeal in *Honeywill & Stein v. Larkin Bros.*, because they are flatly inconsistent with the decision arrived at by that court.

³⁵ e.g., in the *Staveley Case* [1956] 2 W.L.R. at 491.

³⁶ [1921] 2 A.C. 465 at 477, 490.

³⁷ [1899] 2 Q.B. 72 (C.A.).

PURPORTED JUSTIFICATIONS FOR THIS KIND OF VICARIOUS
LIABILITY

The reason why it is hard to be converted to the existing rules of liability for independent contractors is that, as said before, we are not furnished with any justification for the rules that can be regarded as at all satisfactory. The general principle is still supposed to be that a person is not liable for an accident occurring without his own fault or that of his servants in the course of their employment. If this is so, we need some sensible reason why, in any particular case, he should be liable where the injury occurs without his fault but through the fault of an independent contractor employed by him. No such reason is furnished in the judgments under discussion. Instead, we are merely treated to the logical fraud of the "nondelegable duty."

So little has the policy question been discussed that almost nothing has been written on it in England since Pollock's paper, printed in his *Essays* of 1882.³⁸ Pollock approved the general rule of nonliability for contractors, because, he wrote—

"If the duty of answering for other people's negligence did not stop at the first independent authority—'the first person in the ascending line,' as a distinguished judge once put it, 'who is the employer and has control over the work,'—the chain of liability would be endless, and we should be involved in a multiplicity of unknown risks. Besides, it is felt that it would be over-harsh to make men liable not only for acts which they cannot practically control in detail, but for the acts of persons over whom they have no control at all . . . It may seem not obvious why the hirer of a carriage let out by the day or week should be not liable for accidents, while the owner who drives his own carriage is. But every one can see that it would be absurd to impose this liability on the hirer of a cab . . . The vexation and hardship of including in the obligation every one for whom the work was done would outweigh any possible advantages. The rule as it stands [of liability for servants] is supposed to make employers more careful in their choice of servants, and in looking to the state of the plant and instruments of their business, and probably it does so to some extent. This is thought worth securing at the cost of some individual hardship. But the use of care in choosing a contractor who is likely to be careful is too remote a benefit to the community to be enforced by indiscriminate

³⁸ *Essays in Jurisprudence and Ethics* 129.

penalties. It has never been suggested that the existing rule on this point falls short of what is required by natural justice or the safety of the public; so that this discussion is merely curious."

During the present century juristic opinion in England has swung the other way. Pollock himself, in his book on *Tort*, advocated that the occupier should be liable to his invitee for the negligence of contractors; and his opinion, as has been shown, has swayed the courts, and has helped to bring about a situation in which discussion of fundamentals is no longer "merely curious." It is rather remarkable that Pollock thought it unnecessary to give any reason of policy for making this exception to the policy reasons which he had so persuasively argued in 1882. Mr. Chapman's article in the *Law Quarterly Review* seems to have had a considerable influence upon opinion³⁹; it is, in fact, no more than a proposal for an indefinite extension of liability for contractors, on the theory of nondelegable duty, without so much as one sentence on the problem of policy involved, and apparently with no appreciation of the logical and legal difficulties in the theory of nondelegable duties. Professor Friedmann, writing in the *Modern Law Review*, gave the article his enthusiastic support, and argued for the annihilation of the difference between servants and contractors⁴⁰; but the only reason of policy that even he stopped to suggest was that "modern industrial conditions make it a matter of accident whether any of the numerous parties engaged in a complex building or manufacturing process is a subcontractor, or, by way of amalgamation, becomes a servant." This type of argument, if pushed to its logical conclusion, would destroy almost all legal lines. One could contend in the same way for an abandonment of the legal distinctions between capital and income, leases and licences, licences and easements, simple contracts and covenants, because each of the pair may be used to achieve the same business ends. The argument also assumes, wrongly, that all business is big business. The rules of liability apply to the small man, and even to the private employer. Is it to be said that I ought to be liable for the negligence of my taxi-driver because there is an imaginary possibility that I may buy the taxi business?

The question to be asked about every form of vicarious liability, or liability without fault, is: What is to be gained from it? Let us grant, for the sake of argument, that vicarious responsibility for servants is regarded as socially justifiable, as it commonly is,

³⁹ (1934) 50 L.Q.R. 71. Winfield, *Text-Book*, calls it "admirable" (6th ed. 168). For the same point of view see Douglas in (1929) 38 Yale L.J. 584.

⁴⁰ (1942) 6 M.L.R. 84.

and that several of the reasons traditionally given for this form of liability apply equally to suggest vicarious liability for contractors.⁴¹ Even so, there is one great difference, in general, between a contractor and a servant. This is that the contractor is likely to be a person of substance, with machinery and plant that can if necessary be sold to satisfy the judgment debt. It is unlikely that vicarious liability for servants would ever have been developed if servants as a class had been capable of paying damages and costs.⁴² The argument from poverty hardly applies to contractors, who are often far wealthier than their employers. Where both employer and contractor are large firms or covered by insurance the incidence of tort liability may not greatly matter, but where the employer is an individual, who is not likely to be insured, the imposition of liability upon him may bring about the gravest hardship. He can, of course, obtain an indemnity from the contractor, if, perhaps after being sold up to pay the judgment debt, he is still able to carry on a legal battle. But it is not an argument for putting liability on the wrong person that he is able to obtain an indemnity from the real culprit.

From the point of view of the plaintiff, the only case in which the liability of the employer is advantageous is where the contractor is unable to pay the damages. Quite apart from the question of justice, it may be doubted whether this situation is sufficiently frequent to warrant provision being made for it, particularly when it adds so greatly to the difficulty of the law. One would think that the law had done its job in giving the plaintiff a remedy against a person who is likely to be able to pay compensation, either out of his own resources or because he is likely to be insured. That the contractor himself is liable to third parties for misfeasances, at least since the decision in *Donoghue v. Stevenson*,⁴³ there is no longer any reasonable doubt.⁴⁴ Before that decision there may have been cases where the contractor would not have been responsible except to his employer, and in such circumstances there was more reason for making the employer liable to third parties, and leaving him to recoup himself from his contractor. The only situation in which it is at all possible today for the contractor to be free from liability to third parties is where he is guilty of a

⁴¹ The argument from choice applies partly to contractors, because the employer can choose the contractor, and frequently the contractor's servants also. The argument from control partly applies, because there may be considerable control of a contractor. The argument from power to dismiss partly applies, because the employer may have power to dismiss the contractor, and even the contractor's servants. See Holmes in 5 H.L.R. 15.

⁴² Cf. Pollock and Maitland, 2nd ed. ii 533: "Should we nowadays hold masters answerable for the uncommanded torts of their servants if normally servants were able to pay for the damage that they do?"

⁴³ [1932] A.C. 562.

⁴⁴ Above, note 28.

bare nonfeasance. But in the case of nonfeasance the employer will usually himself be negligent in not having seen that the contractor came to do the work. One may, perhaps, conceive a case where the employer has left the scene in reliance on the contractor's promise to do the work, and where the employer is accordingly held free from negligence; here the proper solution is to impose upon the contractor direct liability in negligence to the third party who is injured, even though it is from one point of view a mere nonfeasance. He has, by his promise, knowingly caused his employer to leave it to him to rectify the danger; and his failure to perform should be actionable at the suit of those injured. A rule of law that requires the victim to proceed in the first instance against the employer, on the basis of strict or vicarious liability, and then allows the employer to recover an indemnity from the contractor, is defective, because by creating the circuitry of action it wastes the time and money of a person who need never have been brought in. It is platitudinous to remark that litigation in itself entails an economic loss to the parties and to society, so that a rule that needlessly extends the number of persons involved, and therefore the complexity of the litigation, is open to objection. So also is a rule that in effect requires double insurance, and moreover imposes the necessity of insurance upon a person who would not normally expect to bear the risk.

American decisions on the subject of liability for contractors have gone much the same way as ours—they have even adopted the language of nondelegable duties—and it is worth referring, in conclusion, to three transatlantic studies of the subject. Professor Young B. Smith, considering the rationale of liability for servants, gave his adherence to the "enterprise" theory, whereby the loss is placed on the master for reasons of social insurance; and he thought it sufficient to say of the independent contractor that the loss is placed upon him, and not upon his employer, because it is the contractor who is the *entrepreneur*.⁴⁵ The question was taken up in greater detail by Mr. William O. Douglas.⁴⁶ He thought that from some points of view the loss was better placed on the employer, who could pass it on to his own customers. If placed on the contractor, he will pass it on to his customers, who include the employer; therefore why not put the loss on the employer in the first instance? This would, he thought, be more equitable, in that it would make the employer assume only those risks closely incidental to his own business, and not those that arise as the result of the business of other employers of the contractor. This argument of Douglas's would, of course, imply that the employer

⁴⁵ (1923) 23 Col.L.Rev. 444 at 461.

⁴⁶ (1929) 38 Yale L.J. 584 at 594 *et seq.*

should not be allowed to pass the damages on to the contractor by suing the contractor for an indemnity; for to pass the loss on to the contractor in this way would cause the contractor in turn to pass it on to his employers in general, which is what is to be avoided. Few lawyers would be prepared to follow the writer in the strict logic of this argument. But in any case Douglas himself points out an important argument the other way. This is the factor of prevention of risk. The person who is generally best able to prevent injuries is the contractor, since he is in control—so far as anybody is in control—of the work. The passage in his article on this subject is so well reasoned as to be worth quoting in full.

“First, the person to whom the enterprise has been allocated is, by definition, the one who has agreed or undertaken to perform the specified acts. When *D* [the contractor] agrees to transport a certain load of coal, *M* [the employer] puts it out of mind. He has been relieved of a task and its attendant anxieties, for a consideration. He need no longer worry if the engine will not work; if the brakes need inspection; if new chains are needed for the wheels, or if any should be used: if the present driver is honest, reliable, competent; if a new qualified driver can be secured. These are *D*’s worries as a result of the contract. Therefore the man who is put on guard, and who consequently stands in the more strategic position to be cognisant of the various devices available to lessen the probability of injury to others, is *D*. His promise has made it necessary for him to do the particular acts. He who is planning such performance is in a better situation to arrange for a careful performance than is he who is not planning such performance. Secondly, as a result of this allocation which has been effected *D* normally has more of that ‘control’ which an effective, efficient risk preventer needs than has *M*. Thus in the instant case *D* selects *S* [the servant]. The selection process involves a judgment of competence. The incompetent can be rejected; the efficient employed. Though *M* may be given the power to reject any person sent by *D*⁴⁷ the veto is seldom as effective as the initiative. *D* holds the goad to efficient work by *S* since he pays the salary and may discharge *S*. This may be used effectively, and has a corrective force absent in *M*’s reprimand. *D* has final say on the type of truck to be used; the condition of its repair, including brakes, wheels, axles, engine, etc.; the addition of safety devices—in short full ‘control’ over the mechanical fitness of the vehicle of

⁴⁷ *Reedie v. L. & N.W.R.* (1849) 4 Exch. 244.

transportation. For these reasons it seems clear that in the large number of cases *D* stands in a more strategic position to prevent these risks than *M*. It is strikingly so in cases where the enterprise allocated involves a high degree of skill such as carpentry, masonry, decorating, engineering, plumbing, surgery. The person in *M*'s position not only fails to occupy *D*'s strategic position in respect to the prevention of the risks, but is relatively unqualified to pass judgment on what safety devices should be employed, what the conditions of work should be, what the labour qualifications are, and so on. Frequently, of course, *M* may be given more 'control' over the mechanical details of the work than *M* has in the hypothetical case. The problem in such cases is to translate into risk prevention the types of 'control' which *M* and *D* respectively have. Conceivably a case might be put where *M* is the better risk preventer of the two. Yet it would seem that such case would not represent the normal situation."

The third study is that by Professor Clarence Morris.⁴⁸ He argues that liability for contractors tends to make employers choose contractors who are in possession of enough property to be able to satisfy a judgment, rather than contractors with insufficient financial backing, and that this is in the public interest. If the employer is doubtful, he can demand from the contractor an indemnity bond with sureties. Professor Morris argues that this rationale should lead to the recognition of certain exceptions from the employer's liability, where it would be unreasonable to expect the employer to exercise his power of selection so as to avoid the engagement of a judgment-proof contractor. These exceptions are: (1) where the employment is of a trivial and everyday nature, *e.g.*, hiring a taxicab; (2) where there is an emergency calling for immediate remedy by a contractor; (3) where the work is not likely to cause danger to others, *e.g.*, giving work to a copy-typist. Subject to these exceptions, the author thinks that the employer should be liable for the contractor; and he should be liable even for casual negligence, though not for an act outside the scope of the enterprise. The suggestion certainly puts the most plausible face on this kind of vicarious liability; but the details do not represent the present law, and in any event it may be questioned whether the social evil of the occasional insolvent tortfeasant contractor is of sufficient gravity to justify the somewhat complicated rules and the imposition of vicarious liability.

⁴⁸ (1934) 29 Ill.L.Rev. 339, in effect expanding an argument suggested in (1916) 29 H.L.R. 808-810. See also Fleming James, Jr., in (1954) 28 Tul.L.Rev. at 193 *et seq.*

RES GESTA IN CRIMINAL CASES

R. N. GOODERSON

SIR FREDERICK POLLOCK once said that the phrase *res gesta* meant in English neither more nor less than part of the story.¹ This indicates that the idea behind this principle of the law of evidence is fundamentally a simple one, yet the present state of the law is such that a learned judge may confess without shame that he sees as through a glass darkly,² and of the writers, Wigmore and Julius Stone, despairing of finding any firm basis for any such principle, favour a fresh start upon a different foundation or foundations. The general impression conveyed to lawyers is of an idea of great amplitude, and one fraught with tremendous possibilities. Lord Blackburn, a Victorian common lawyer, and Harman J., a modern Chancery judge, both jocularly advise any counsel seeking to obtain admission of a doubtful piece of evidence to pin his faith in *res gesta*. The feeling that at a pinch the doctrine might give some relief is not unjustified. Owing to the many exclusionary rules of the law of evidence, it is rarely possible to tell a plain tale in court. The importance of the *res gesta* principle is that where it applies it will nullify certain of these exclusionary rules. An act, a declaration accompanying an act, or a mere declaration may form part of the *res gesta*. Before qualifying for admission, all such evidence must satisfy the test of relevancy in the sense of materiality. In the case of an act, this is normally the only test, at any rate if the act is offered in evidence for its own sake, and not as equivalent to an assertion of fact or opinion.³ Statements accompanying a relevant act are also readily received as part of the *res gesta*.⁴ It is where a mere declaration is offered in evidence that the main difficulties

¹ *Homes v. Newman* [1931] 2 Ch. 112, 120.

² *R. v. Wilkinson* [1934] 3 D.L.R. 50, 52, *per* Ross J. in the Supreme Court of Nova Scotia.

³ In *Molino v. New York* (1921) 186 N.Y.Supp. 742, a lorry driver, after running over a child, jumped from the lorry and began to run away. This was held inadmissible as part of the *res gesta* in an action against the driver's employer to prove the negligence of the driver. Chafee criticises, as in his view conduct cannot be hearsay: (1922) 35 Harv.L.R. 430. But it has been argued convincingly that conduct may be hearsay if offered by the proponent as equivalent to an assertion of fact or opinion: Cross in (1956) 72 L.Q.R. 94-100. Even if *prima facie* hearsay, it is submitted that the act of flight should have been accepted as part of the *res gesta*, being substantially contemporaneous with the transaction, as required by Thayer's test—see note 12 (see also (1921) 30 Yale L.J. 866).

⁴ See *infra*.

arise, for if it is a declaration of a person not examined as a witness, it may *prima facie* fall under the ban of the hearsay rule,⁵ the rule that assertions or statements relied on as equivalent to assertions, although not primarily intended as such by their maker, of persons other than the witness who is testifying, are inadmissible as evidence of the truth of that which was asserted.⁶ Even if it is a previous utterance of an actual witness, it may be excluded by the rule against self-corroboration, whereby the fact that a witness has made a previous similar statement is inadmissible to confirm his testimony in court,⁷ except where he is charged with recent fabrication, or is the complainant on a charge of a sexual offence, or perhaps any offence of violence. The vital importance of establishing that a statement is part of the *res gesta* is that under its aegis may come in declarations otherwise open to objection as hearsay or self-corroboration. Other exclusionary rules that the principle may have power to overcome are the rule rejecting evidence of opinion, the rule that a previous statement retracted in court cannot be used to prove its truth, but merely to contradict the version now offered, and the rule that a confession obtained by an improper inducement is inadmissible.

This principle then opens an avenue of escape from the confines of the rules that hamper the proof of relevant evidence. The question to be examined is how far the courts have placed further obstacles to hinder free passage along this avenue. In English cases there is discernible the requirement not merely of relevance, but also of some degree of contemporaneity with some act of the victim or of the accused. Statements as to past acts are generally excluded, and hesitation is shown over statements as to future acts. Further, to be part of the *res gesta* the statement must be part of the story or transaction. When is the transaction deemed to begin for this purpose, and when is it deemed to end? Logically an attempt should first be made to discover when the story or transaction is deemed to begin, but here the process will be reversed because the case of *Bedingfield* aroused a bitter controversy⁸ over

⁵ Most writers nowadays consider that some forms of *res gesta* evidence are admitted as exceptions to the hearsay rule, some as original evidence: Morgan (1922) 31 Yale L.J. 229, Stone (1939) 55 L.Q.R. 66. *Contra* Phipson, *Evidence*, 9th ed., 229, who regards *res gesta* as only a spurious exception to the hearsay rule.

⁶ This is the rule against hearsay as formulated by Cross, *op. cit.*, at p. 100.

⁷ For this rule, see Phipson, *op. cit.*, 512.

⁸ Between Cockburn C.J., the trial judge (see (1879) 14 Cox 341 for his judgment, and (1880) 15 L.J. 5 for his reply to Pitt Taylor), and Judge Pitt Taylor, author of the classic work on *Evidence*, who attacked his view in a Pamphlet (1880), Thayer, the great American writer intervening in (1880) 14 Am.L.R. 817 and (1881) 15 Am.L.R. I, 71. Years later battle was again joined with similar acerbity between Sibley (1903) 19 L.Q.R. 203 and (1904) 20 L.Q.R. 85) and Phipson (1903) 19 L.Q.R. 435).

when the transaction ends that has never been authoritatively settled, and still perplexes law students. Mrs. R.'s throat had just been cut. She declared: "See what Harry has done." Harry was absent at the time, and all action on his part had ceased. Was Cockburn C.J. right to reject this statement at Harry's trial for her murder on the ground that the transaction was over? In attempting to answer this question, the topic of complaints will be considered. As mentioned above, this is one of the exceptions to the rule against self-corroboration as is *res gesta* itself, and an appreciation of the cases requires a study of both grounds of admissibility.⁹ Declarations as to symptoms will be discussed, as these are on a special footing, requiring contemporaneity only with the symptoms themselves, whereupon provided the symptoms are relevant admissibility is secured. Special difficulties surrounding statements of opinion offered as *res gesta*, statements in writing and statements accompanying an act will be mentioned. The problem of the beginning of the story will be discussed, and the separate features that characterise declarations of the victim, of the accused and of third parties respectively. Attention will be concentrated on criminal cases, as it is believed that a laxer practice favouring admissibility prevails in civil cases, despite the insistence of some writers that the rules are the same.¹⁰

Of the many views of the scope of the transaction for *res gesta* purposes those of Cockburn C.J. and Thayer must first be mentioned, as phrased with *R. v. Bedingfield* in mind. Cockburn enunciates his principle as follows:—

"Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment—whether on the part of the agent or wrongdoer, in order to its performance, or on that of the patient or party wronged, in order to its prevention—and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive—as, e.g., in the case of flight or applications for assistance—form part of the principal transaction, and may be given in evidence as part of the *res gestae*, or

⁹ The complaint rule looms large in the conflict—Cockburn bases himself upon remarks of Cresswell J. in the complaint case of *R. v. Osborne* (1842) 1 C. & M. 622. Pitt Taylor in reply argues on an analogy from such cases (Pamphlet, pp. 16-17), and Sibley considers that the famous complaint case of *R. v. Lillyman* [1896] 2 Q.B. 167 supports Cockburn's view: (1903) 19 L.Q.R. 203, 218.

¹⁰ e.g., Thayer (1880) 14 Am.L.R. 817, 828-829; (1881) 15 Am.L.R. 71, 91.

particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrongdoer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrongdoer—such as, *e.g.*, statements made with a view to the apprehension of the offender—do not form part of the *res gestae*, and should be excluded.”¹¹

Thayer, who was one of the first to intervene in the *Bedingfield* controversy, and considered that Cockburn should have received the declaration, observes:—

“The leading notion of the doctrine . . . seems to have been that of withdrawing from the operation of the hearsay rule declarations of fact which were very near in time to that they tended to prove, fill out, or illustrate—being at the time not narrative, but importing what was then present or but just gone by, and so was open, either immediately or in the indications of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to these indications; this nearness of time is made specific by the terms ‘contemporaneous’ and ‘a part of the *res gesta*,’ and it is enough that the declaration be substantially contemporaneous; it need not be literally so.”¹²

Both writers thus insist on the requirement of substantial contemporaneity, and the controversy between them is a matter of degree, Cockburn requiring that at the time of the statement the action of the accused should be continuing, either actually or constructively, while Thayer does not demand this, provided that the statement is substantially contemporaneous with such action. Wigmore rejects both these views. He regards the element of contemporaneity as properly applicable only to what he calls the Verbal Act doctrine, where the utterance is offered irrespective of its truth as accompanying and explaining a material equivocal act.¹³ His other main head of *res gesta* evidence is spontaneous exclamations—a statement or exclamation, by a participant, immediately after an injury, declaring the circumstances of the injury, or by a person present at an affray, or railroad collision, or other exciting occasion, asserting the circumstances of it as observed by him.¹⁴ Instead of the requirement of contemporaneity there is a “liberal time-allowance” which is exhausted only when the influence of the exciting cause has been dissipated.¹⁵ Wigmore’s view may one day prevail in the United States, though even there it seems that

¹¹ (1880) 15 L.J. 16-17.

¹² (1881) 15 Am.L.R. 107.

¹³ (1940) vi, para. 1756, 1776, pp. 162-164, 197. See also *infra*.

¹⁴ *Ibid.*, para. 1746, p. 134.

¹⁵ *Ibid.*, para. 1750, p. 142.

the theory of Thayer holds equal sway,¹⁶ but in criminal cases of England and the Commonwealth there seems to be no acceptance of the spontaneous exclamation theory or of its concomitant the liberal time-allowance.¹⁷ Julius Stone supports Wigmore in his main argument, and in his criticism of Cockburn for failing to distinguish a spontaneous exclamation, such as that in issue in *Bedingfield*, from cases falling under the Verbal Act doctrine, but though English cases are discussed, there is no attempt to grapple with the problem that the state of English case-law presents.¹⁸ Another theory that must be rejected as at variance with too many decided cases is that advanced in the latest edition of Kenny.¹⁹ A new distinction is drawn both for hearsay and *res gesta* purposes between evidential and non-evidential statements. Only evidential statements are excluded by the hearsay rule, and only non-evidential statements are included under the *res gesta* rule. Thus *res gesta* is no help in permitting the admission of what would otherwise be excluded as hearsay, and presumably its only sphere of operation so far as statements are concerned would be to allow in evidence a remark that might otherwise be rejected under the rule against self-corroboration.²⁰ The test whether a statement is evidential is whether the speaker is giving his account of facts or events he has observed. To hold that an evidential statement can never be admitted under the *res gesta* rule would involve rejecting not only the view of Thayer, but also that of Cockburn, who would

¹⁶ See Chafee (1922) 35 Harv.L.R., p. 447.

¹⁷ Baker, *The Hearsay Rule*, 155; *R. v. Leland* (1951) 11 C.R. 152, 168 (Ontario Court of Appeal reversing McRuer C.J.); *Adelaide Chemical & Fertilizer Co. v. Carlyle* (1940) 64 C.L.R. 514, 531-532, per Dixon J. In some civil cases, notably *Lloyd v. Powell* [1914] A.C. 733, the House of Lords has stretched the idea of transaction to an extent that worries Wigmore: vi, para 1757, pp. 169-170. For other American comment on this case, see (1915) 28 Harv.L.R. 299 and (1924) 37 Harv.L.R. 513, 520.

¹⁸ Where so-called *res gesta* evidence is admitted as original evidence, Stone takes his stand on relevancy, but a statement is not necessarily receivable as soon as its relevancy is shown, for apart from hearsay it may come up against other exclusionary rules such as that against self-corroboration, or the rule that to be received in sexual cases complaints must be made promptly. He cites *Guttridge* (1840) 9 C. & P. 471 as a case where the words, whether contemporaneous or not, of the victim of alleged rape were admissible as relevant to prove a fact in issue, i.e., consent, but a complaint in a letter written two months after the alleged assault showing anger would be relevant on a fact in issue, i.e., absence of consent, but would be inadmissible. It is submitted that the object of the English lawyer should be to try to determine the operation of the *res gesta* doctrine in overcoming the obstacle of exclusionary rules: where one of the latter is concerned, it is useless to raise the cry of relevancy. The plea of relevancy is answered by the reply of the exclusionary rule, e.g., hearsay, self-corroboration, and to rebut the reply it is needful to pray in aid the principle of *res gesta*.

¹⁹ *Outlines of Criminal Law*, 16th ed. (Turner), 402, 404. The *Bedingfield* declaration is rejected by the learned editor not because it was not contemporaneous, but on the ground that it was evidential.

²⁰ The learned editor also considers statements as to bodily feelings to be admissible not being evidential in character: *ibid.*, 405.

have admitted the declaration had Bedingfield still been pursuing his victim, and that of Wigmore, for the spontaneous exclamation doctrine receives statements declaring the circumstances. It is submitted that this theory in Kenny is too liberal in its admission of evidence that ought to be regarded as dangerous hearsay,²¹ and too strict in its rejection of evidence offered as *res gesta*.

In *R. v. Bedingfield* B. was charged with the murder of Mrs. R. Mrs. R. came from a room, where B. was subsequently found lying with his throat cut, walked twenty-five to thirty yards, and met two prosecution witnesses, to whom she said, pointing to her throat, which was cut: "See what Harry (B.) has done." She died ten minutes later. This statement was held to be inadmissible as part of the *res gesta* as the transaction was over²²; the mortal wound had already been inflicted, and all action on the part of the accused had ceased. Mrs. R. had nothing further to fear from B., as to her knowledge his throat was cut,²³ and B. was not present when the statement was made.²⁴ Cockburn would have allowed the statement had B. been pursuing Mrs. R., even though out of earshot²⁵: an illustrative case is *Gilbert v. R.*,²⁶ where G. was charged with the murder of A. A. had cried out to witnesses: "Hold on boys, hold on. He shot me, and he will shoot me again." Evidence of these cries was held admissible, although A. had already received a mortal wound, as G. was still pursuing at the time.

AUTHORITIES CONFIRMING BEDINGFIELD'S CASE ✓

English cases which give some support to the strict view of Cockburn C.J. are *R. v. Goddard*, where Hawkins J. rejected a complaint made ten minutes after a mortal injury, though it was

²¹ It is submitted that the better view is that of Cross in (1956) 72 L.Q.R. 91, 93, who considers that exclamations fall under the hearsay rule, and that the test is not what the speaker intended, but the purpose for which the exclamation is offered by the proponent—see, e.g., the definition of hearsay in the *Model Code of Evidence* of the American Law Institute, cited in (1949) 62 Harv.L.R. 177, 215. The illustration of a non-evidential statement in Kenny (402) is: "Hallo, Mr. X., where are you going?" It is submitted that if this is tendered to prove that Mr. X. was present, it is hearsay of the most objectionable kind, for identification evidence is notoriously unreliable unless subjected to cross-examination.

²² *Per* Cockburn C.J. Field and Manisty JJ., who had previously been asked by the L.C.J. to read the depositions, agreed with his view. The remark was also rejected as a dying declaration, as Mrs. R. did not indicate that she had no hope of recovery. ✓

²³ There was no cogent evidence that Mrs. R. had this knowledge: Pitt Taylor scores heavily on this point: Pamphlet, p. 11.

²⁴ If the accused had been present, the statement would be evidence against him to the extent that by his conduct he had admitted the statement: *D.P.P. v. Christie* [1914] A.C. 545.

²⁵ (1880) 15 L.J. 17.

²⁶ (1907) 38 S.C.R. 284. Supreme Court of Canada.

probably the victim's first opportunity to mention the matter to anyone,²⁷ and *R. v. Gibson*, where on an assault charge a witness was not allowed to prove the remark of a woman, not called as a witness, who a few minutes after the injury, to assist the apprehension of the offender, said: "The man who threw the stone went in there."²⁸ The latter authority is weakened by the absence of any reference to the doctrine of *res gesta* at all. The Irish case of *R. v. Meath* is sometimes said to support the strict view, but the report does not indicate what time had elapsed between the injury and the statement.²⁹ Commonwealth support comes from two cases. In *R. v. Leland* Mr. and Mrs. L. were charged with the manslaughter of Mr. M., who was their landlord and occupied the ground floor below their first floor flat. During a fight between Messrs. L. and M. in the first-floor bathroom Mrs. M. turned out the house lights to cool their ardour, but the scuffle continued. When the lights went on again, Mr. M. came to the head of the stairs and called to his wife: "Rose, she (referring to Mrs. L.) stabbed me." He then came downstairs trailing blood, collapsed and was dead in a few minutes. It was held that Mrs. M., her daughter and two lodgers, who heard Mr. M.'s accusation, were excluded by the hearsay rule from repeating it in court.³⁰ In *R. v. Velekaze*, where V. was charged with murder, policeman A. was not permitted to testify that policeman B., as he ran towards him very shortly after the stabbing, pursued by several assailants, called out to him: "Catch that man (V.). He stabbed the deceased."³¹

AUTHORITIES CONTRARY TO BEDINGFIELD'S CASE

Thayer's more liberal view is well illustrated by the American case of *Com. v. Hackett*, where H. was charged with the murder of D., and W. was allowed to testify that he was in the street when he

²⁷ (1882) 15 Cox 7. Admitted as a dying declaration.

²⁸ (1887) 18 Q.B.D. 537.

²⁹ Baker, *op cit.*, 160. (1909) 43 Ir.L.T. 186.

³⁰ See note 17. Two of the witnesses reported Mr. M. as having said: "She stabbed me through the heart." The trial court made no ruling on admissibility as a dying declaration. Is a declarant deemed to have abandoned hope if he acknowledges a stab through the heart? See (1879) 14 Cox 341, 343 (a), for the controversy, arising in *Bedingfield*, whether a declarant, who has sustained a wound obviously mortal, must expressly say he is dying before his statement can be admitted as a dying declaration.

³¹ [1947] 1 S.A.L.R. 162. Policeman B. was also called as a witness. Crown counsel conceded that the evidence was not admissible as *res gesta*. It is analogous to a cry of "Stop thief!" which Cockburn would reject, but Thayer and Pitt Taylor would admit: Pamphlet 21. Pitt Taylor continues: "If the pickpocket, when taken, declares that the purse found upon him was given to him by the loser of it, that plausible story must go to the jury without the antidote offered by proof of the cry." This is an erroneous comment, for *ex hypothesi* the "plausible story" is not part of the *res gesta*, and will be excluded under the rule against self-corroboration.

heard D. cry out: "I'm stabbed." W. reached D. within twenty seconds, and D. then said: "I'm stabbed, I'm gone; Dan Hackett has stabbed me." In admitting the evidence, Bigelow C.J. said that it was important that the statement was made after the act was done and in the absence of the accused, but these circumstances were outweighed by the close connection with the principal transaction (W. had heard the first cry), and by the fact that the interval was so brief.³² Hawkins J. has been quoted as a supporter of *Bedingfield*,³³ but in *R. v. Horsford* he said it was wrong and had been disapproved of in a subsequent case.³⁴ Pitt Taylor refers to a contrary decision by Denman J. at Maidstone Assizes.³⁵ The old case of *R. v. Foster*³⁶ permits a statement made at the first opportunity by a since deceased victim of a running-down accident. A Natal court, seeking to apply English law, regarded *Bedingfield* and *Foster* as in conflict, and in deference to the opinion of that very learned judge Sir Henry de Villiers C.J. in *R. v. Le Roux*³⁷ preferred *Foster*. This was in *R. v. Nicholls*,³⁸ where W., hearing a scream, followed by four or five shots in rapid succession, rushed a few feet towards the room from which the sounds came. He saw D. trying with his foot to push N. out of the doorway. D. succeeded and N. fell to the ground apparently unconscious. D., pistol in hand, staggered into the room where W. was, and said to Mrs. Z.: "I got it from him." W. was allowed to repeat D.'s statement at N.'s trial for the murder of D. Cockburn would have rejected such evidence, for D. had nothing further to fear from N.: he had the gun and N. was unconscious.³⁹ Two English cases where statements were admitted that would have come under Cockburn's ban are *R. v. Barlow* and *R. v. Barney*. In each case the Crown led evidence of similar facts to prove a murder charge. Barlow was charged with murdering S. by poison on September 10. S.'s landlady testified that on the 3rd B. visited S., who till then was in good health. As soon as B. left, S. came

³² (1861) 2 Allen 136 (Mass.). Discussed in (1881) 15 Am.L.R. 84. Thayer is not however ready to concede a "liberal time-allowance"; e.g., he does not accept *Com. v. McPike* (1849) 3 Cush. 181, where the statement was made after a considerable interval, and he rejects other cases based on the loose doctrine, which he ascribes to the activity of some "famously ignorant" English judges in bankruptcy cases; *ibid.*, p. 20.

³³ Archbold, *Criminal Pleading*, 33rd ed., 393, relying on *R. v. Goddard* (see note 27).

³⁴ *The Times*, June 2, 1898.

³⁵ Pamphlet, p. 6.

³⁶ (1834) 6 C. & P. 325.

³⁷ (1897) 14 S.C. 424.

³⁸ (1931) N.P.D. 557.

³⁹ It is not admissible as a statement made in the presence of the accused, for he is insensible and his silence cannot be interpreted as an acceptance of D.'s version: *Watson* [1955] Crim.L.R. 566 (Court of Criminal Appeal).

down from her room, knocked at the landlady's door, and told her she was very sick from the sarsaparilla B. had given her.⁴⁰ No objection was raised by the defence, but S.'s statement could be admitted only as part of the *res gesta*: apart from this doctrine the landlady could prove only what S. said as to her symptoms, and not the cause of those symptoms, except in rebuttal should the defence be that S. committed suicide: *R. v. Horsford (infra)*. In *R. v. Barney*, Mrs. B. was charged with shooting and murdering her paramour S. The Crown led evidence that three weeks before, Mrs. H., a neighbour, had heard an altercation in the small hours, a cry from Mrs. B. of "Laugh, baby, laugh for the last time," and had then seen Mrs. B. shoot from an upper window at S. as he was leaving. In cross-examination Mrs. H. admitted that immediately after the shot was fired S. apologised to her for being such a nuisance in the mews, and said he was afraid to leave Mrs. B. for fear she should commit suicide. Humphreys J. admitted this evidence, despite the objection of Crown counsel⁴¹: it was vital for the defence, as Mrs. B.'s explanation of the fatal shot three weeks later was that she was threatening to commit suicide as S. was about to leave her, and the gun went off in the struggle.

It has been argued that the decision of the Court for Crown Cases Reserved in *R. v. Lillyman*⁴² supports *Bedingfield*. The argument is that Hawkins J., delivering the judgment of the court, expresses agreement with the ruling of Cresswell J. in *R. v. Osborne*⁴³ that the statement of the prosecutrix in the latter case was not part of the *res gesta*, that in *Bedingfield* Cockburn said that the analogy between *Osborne* and *Bedingfield* was complete,⁴⁴ and therefore Hawkins J. and his learned brethren implicitly approve *Bedingfield*.⁴⁵ But Hawkins J. expressly disapproved *Bedingfield* in *R. v. Horsford*,⁴⁶ and further, though it does not appear what time had elapsed in *Osborne* between the injury and the statement, Cresswell J. followed *R. v. Wink*,⁴⁷ where the statement was made no less than five and a half hours after the event, a period that does not necessarily exclude a complaint but is far too long to allow admission of a *res gesta* statement.⁴⁸

⁴⁰ Before Denman J. (1876) Browne & Stewart, *Trials for Murder by Poisoning*, 268-269.

⁴¹ *The Times*, July 5, 1932. It has been said that the judge strained the laws of evidence in favour of the defence (see Dr. G. L. Williams, *Proof of Guilt*, 154, quoting Sir Patrick Hastings, *Cases in Court*, 272), but it is submitted that the evidence was admissible according to Thayer's test, though Cockburn would clearly reject it.

⁴² See note 9.

⁴⁴ (1880) 15 L.J. 17.

⁴⁶ See note 34.

⁴⁸ See also Thayer in (1880) 14 Am.L.R. 817, 837—it is plain that Cresswell J. was not contemplating nice questions like *Bedingfield*.

⁴³ *Ibid.*

⁴⁵ Sibley (1903) 19 L.Q.R. at p. 218.

⁴⁷ (1834) 6 C. & P. 397.

Bedingfield has been considered by the House of Lords in *D.P.P. v. Christie*,⁴⁹ and by the Privy Council in *Teper v. R.*⁵⁰ In the latter case Lord Normand said that *Bedingfield* had been approved by Lord Reading, Lord Dunedin concurring, in *Christie*, but neither Lord Reading nor Lord Atkinson, the only other judge to deal with *res gesta*, though citing both *Foster*⁵¹ and *Lunny*,⁵² as well as *Bedingfield*, and appreciating that the latter case is stricter, gives any indication of his preference between the two views, but merely observes that on either view the statement of the child in the case under consideration must be excluded.⁵³ *Teper's* case itself is also equivocal on the point. Lord Normand, quoting from his own judgment in *O'Hara v. Central S.M.T. Co.*,⁵⁴ states that the law of Scotland does not require absolute contemporaneity: there a statement was received that was made immediately after an accident in the presence of all the parties, and at the scene of the injury, yet his Lordship also cites *Bedingfield*. The solution may be that in the Scottish case the statement was made at the scene of the accident, whereas in *Bedingfield* the injury was received nearly thirty yards away, the other side of a closed door.⁵⁵

Authority seems at the moment to be balanced fairly evenly between the views of Cockburn and Thayer. It is suggested that the opinion of Thayer should be preferred, thus allowing a little more elasticity in the admission of evidence, and relying on the discretion of the court to exclude evidence even though admissible should its weight be slight but its prejudicial effect against the accused considerable.⁵⁶ Apart from the exercise of discretion, the court has to be careful that in holding that the transaction was still continuing, and therefore the declaration was admissible, it does not assume the question to be decided by the jury.⁵⁷ Pitt Taylor is not alive to this danger: in his attack on *Bedingfield* he cites with

⁴⁹ [1914] A.C. 545.

⁵⁰ [1952] A.C. 480, where it was held that on a charge of arson against T. for setting fire to his shop P.C. Cato could not testify that, as a car drove by, 230 yards from the fire, and 26 minutes after the outbreak, he heard some woman say: "Your place burning and you going away from the fire." (The lapse of time was so great that neither Cockburn nor Thayer would have accepted this evidence.)

⁵¹ See note 36.

⁵² (1854) 6 Cox 477. An Irish case, relied upon by Pitt Taylor in the famous dispute, and probably too lax even by Thayer's standard, unless the complaint of robbery was made sooner after the crime than seems indicated by the report.

⁵³ [1914] A.C. at pp. 556, 567.

⁵⁴ 1941 S.C. 363, 381—a Scottish civil case.

⁵⁵ Lord Normand in *Teper* (487) refers to the requirement of close association of "time, place and circumstances." See also Morgan in (1922) 31 Yale L.J. at p. 236, though in rather a restricted context. Place does seem to be important.

⁵⁶ See the concluding submissions in this article.

⁵⁷ There is a similar risk where the question is whether the transaction had yet begun at the time of the declaration (see *infra*).

approval an argument in favour of the admissibility of the famous declaration from a correspondent.⁵⁸ The latter argues that B., before making his assault, had contrived a scheme to kill Mrs. R., to wound himself and then accuse her of attempted murder and suicide. At the moment Mrs. R. cried: "See what Harry has done" the scheme was not fully concluded, and the cry was therefore part of the *res gesta*. But the whole question for the jury was whether B. had contrived such a scheme, or it was in fact a case of attempted murder followed by suicide. One of Cockburn's reasons for rejecting the evidence is that if he admitted it on the hypothesis that Mrs. R. was running away, he would prejudice the issue raised by the defence as to which was the assailant.⁵⁹ Apparently Pitt Taylor and his correspondent would have no compunction about prejudging the issue.

COMPLAINTS

It is now necessary to say something about the law of complaints, because of its bearing on the *Bedingfield* problem. Complaints are admissible though not made at the very first opportunity provided they are made at the first reasonable opportunity, but unlike statements admitted as part of the *res gesta*, they are admissible only to show the consistency of conduct of the complainant, or the absence of consent if in issue. It is often considered that the admissibility of such complaints, which would otherwise be excluded by the rule against self-corroboration even if the complainant also testified in court, is confined to charges of sexual offences, and dicta in *R. v. Osborne*⁶⁰ support this view, but it is based on an erroneous view of history,⁶¹ and it is submitted that they are admissible in all crimes of violence.⁶² It was not until *R. v. Lillyman*⁶³ that it was finally decided that not merely the fact of complaint, but also the details are admissible. The point was still an open one at the time of *Bedingfield*, where the defence was that Mrs. R. attempted to cut B.'s throat, while he was cutting her corns, and afterwards cut her own throat, and Cockburn C.J. admitted the fact of complaint by Mrs. R., though not the details, on the question of who first

⁵⁸ Pamphlet, pp. 23-24.

⁵⁹ (1880) 15 L.J. 18.

⁶⁰ [1905] 1 K.B. 551 (Court for Crown Cases Reserved).

⁶¹ See Sibley (1904) 20 L.Q.R. 86-87, quoting the relevant passages from Bracton, not merely that cited by the C.C.R.

⁶² *Per* Bankes L.J. in *Jones v. S.E.R.* (1918) 118 L.T. 802, 805; *R. v. Folley* (1896) 60 J.P. 569. *Beatty v. Cullingworth* (1896) is often cited to the contrary, but though the *obiter* of Hawkins J. in the lower court (1896) 60 J.P. 740 is clear, the C.A. (*The Times*, January 14, 1897) merely decide that complaints are not admissible in civil cases.

⁶³ See note 9.

raised the alarm, presumably in rebuttal,⁶⁴ and probably on the same basis as in the complaint cases to negative consent. Another case where admissibility is reserved for rebuttal is *R. v. Horsford*. H. was charged with the murder of D. and Hawkins J. allowed D.'s daughter to prove that D., lying in bed in agony, told her she had taken poison,⁶⁵ but as it was not a case of *res gesta*, the poison having been received thirty-six hours before, refused to allow her to repeat D.'s allegation that H. had sent it to her, unless the defence of suicide was raised when it would be admissible in rebuttal. It is doubtful whether the evidence was considered admissible in rebuttal of suicide on the same basis as in *Lillyman*, i.e., to negative consent. Logically this should be so, and this is borne out by the analysis of Cardozo J. in *Shepard v. U.S.A.*⁶⁶ There Dr. S. was charged with the murder of his wife by mercury poisoning. Two days after her illness began, Mrs. S., on her sick bed, had asked a nurse to bring a whisky bottle from S.'s room. She said this was the liquor she had taken, and asked if there was enough left to test for poison, as the smell and taste were strange. She added: "Dr. S. has poisoned me." This evidence was tendered as a dying declaration, but the prosecution failed to prove that at the time Mrs. S. was labouring under a settled hopeless expectation of death. It was then argued that it was admissible on another ground, to rebut the evidence of defence witnesses, who had testified to declarations by Mrs. S. indicating a mind bent on suicide.⁶⁷ Cardozo J. refused to allow this change of front, for the declaration had been tendered as evidence of truth, but was now offered as betokening a state of mind inconsistent with the presence of a suicidal intent, and not as evidence of truth. One difficulty of regarding *Horsford* and *Beddingfield* as based upon the *Lillyman* principle is that the declarant in each case was dead, and it is very doubtful whether in sexual cases a complaint can be tendered where the complainant is dead.⁶⁸ The answer is perhaps that even if the

⁶⁴ See comment by the reporter in (1879) 14 Cox 341, 345, and *The Times*, November 14, 1879, for the full summing up. It may be noted that Pitt Taylor considered the details of Mrs. R.'s complaint could be admitted only because of the defence of suicide. His view is that had the question been whether B. or say X murdered Mrs. R., the reference to B.'s name in the complaint should have been excluded. In other words, the complaint can be used only to disprove consent, not to establish identity. He relied on the analogy of complaints in sexual cases: Pamphlet 16-17. Thayer convincingly disposes of this view: (1881) 15 Am.L.R. 1, 2-4.

⁶⁵ As a declaration as to symptoms (see *infra*). *The Times*, June 6, 1898. See also *R. v. Rowland* (1898) 62 J.P. 659.

⁶⁶ (1933) 290 U.S. 96. Supreme Court of U.S.A.

⁶⁷ It is doubtful whether the defence evidence of declarations of suicidal intent would be admitted in England (see *infra*).

⁶⁸ In *Guttridges* (1840) 9 C. & P. 471, on a charge of rape, Parke B. held a complaint inadmissible where the complainant was dead. *Contra, Megson* (1840)

complaint of a deceased complainant must in general be rejected, it is not inadmissible where the accused is charged with causing the death of the complainant, provided it is not used to prove the killing, but only in rebuttal to negative suicide.⁶⁹

~~RES~~ RES GESTA IN TRANSACTIONS OF A CONTINUOUS NATURE OR
WHERE INDIRECT METHODS HAVE BEEN USED ✓

Now that *R. v. Horsford* has been considered as a complaint case, it is time to repeat that the declaration was rejected as part of the *res gesta*, and to challenge this decision. There was evidence that H. had written to the deceased that the powder was quite harmless.⁷⁰ A day and a half after receiving it, she retired to bed and took the powder. Within half an hour she was in agony (in fact she was dying from strychnine poisoning). May someone not repeat her statement that H. sent it to her, a statement made as soon as she realised that the powder was not harmless? If not, the law of evidence will benefit the subtle and the cunning. It is submitted that whatever view is taken as between the opinions of Cockburn C.J. and Thayer in a case where the alleged method of attack is direct, as with a razor, the view of Cockburn is too strict where death is alleged to have been caused by an indirect and insidious means, enabling the wrongdoer to be absent when his victim first appreciates that something is wrong. This would be the case if a time bomb, a spring gun, a booby trap or poison was employed.⁷¹ In fact in cases of alleged poisoning there is in general discernible a practice more lenient towards the admission of statements of deceased victims, than that followed in *Bedingfield* or even in *Horsford*. In considering poison cases, it is first necessary to mention a rule of evidence admitting declarations as to contemporaneous symptoms. The rule is usually ascribed to the *res gesta* principle, but provided the state of health of the declarant is relevant the statement does not need to be part of the transaction. If however the declarant states the cause of the symptoms or refers

9 C. & P. 420, and *Nicholas* (1846) 2 C. & K. 246, but both were cases where the evidence was received without objection. See also Wills, *Evidence*, 3rd ed., 357.

⁶⁹ Another difficulty is the attitude of Hawkins J. himself, for in *Beatty v. Cullingworth* (1896) 60 J.P. 740, about 18 months before *Horsford*, his Lordship had held that complaints were admissible only in sexual cases. It seems that his Lordship must have forgotten his view in *Beatty's* case, or failed to appreciate that the principle he enunciated in *Horsford* was fundamentally similar to the rule in *Lillyman's* case.

⁷⁰ See the summing up, *The Times*, June 7, 1898, referring to a letter from H. found under deceased's pillow: "Take it in a little water. It is quite harmless."

⁷¹ The point is well made by Shelby J. in the American case of *Jack v. Mutual R.F. Life Association* (1902) 51 C.C.A. 36, cited by Wigmore, vi, 143.

to past symptoms, the declaration can be admitted only if it is offered in rebuttal as in *Horsford*, or is part of the transaction. A reference to a past symptom which was not a part of the transaction was rejected in a civil case,⁷² but where the transaction is a continuous one, statements as to past symptoms and their cause have been admitted even in criminal cases. One of the most lenient cases under this head is *H.M. Advocate v. Madeleine Smith*, where S. was charged with the murder of A., by administering arsenic on February 19 and 22 and March 22, causing his death on the 23rd. Miss Perry, a prosecution witness, was allowed, without objection, to testify that on March 9 A. said to her: "I can't think why I was so unwell after getting that coffee and chocolate from her (referring to S.)." Miss P. gathered that A. was alluding to two different occasions, probably February 19 and 22.⁷³ In *R. v. Blandy* B. was charged with poisoning her father with arsenic, he dying on the 14th. A doctor, who visited the father on the 10th, was allowed to state how the deceased described his symptoms after drinking gruel on the night of the 5th and 6th, and that he named his daughter as the poisoner.⁷⁴ Other cases involve the recounting of more recent symptoms, such as the chambermaid's account of Cook's early morning description to her of his night of agony, after the pills Palmer gave him at 10.30 the previous night,⁷⁵ or Mary Macleod's description of Mary Paterson's story of a night of suffering after she had tasted the egg flip that Dr. Pritchard later gave to his wife.⁷⁶ In *R. v. Barlow* (*supra*),⁷⁷ the symptoms were contemporaneous, but the witness was allowed, without objection, to give the deceased's account of the cause thereof, a course permissible only where the statement is part of the transaction. In *R. v. Lamson*,⁷⁸ the symptoms were contemporaneous, and the deceased's description, though it imported a reference to happenings over three months ago, was admitted despite objection. In *R. v. Black*, however, where B. was charged with the murder of his wife with

⁷² *Gardner Peerage Case* (1824) Le March 169-174. The question was whether a birth had followed protracted gestation. A midwife testified that she had known of a case of a woman F. exceeding ten months. F. told her she was sure she had gone beyond her time. Held that the midwife could not repeat F.'s statement that the last time she menstruated was so many months before. Cf. *Aveson v. Kinnaird* (1805) 102 E.R. 1258.

⁷³ (1857) *Notable Scottish Trials*, F. Tennyson Jesse, 139.

⁷⁴ (1752) 18 St.Tr. 1117, 1135-1137. This was possibly opinion evidence so far as the naming of the poisoner was concerned. (See *infra*.)

⁷⁵ *R. v. Palmer* (1856) Bennett's S.H. Report 38.

⁷⁶ Trial of *Dr. Pritchard* (for the murder of his wife), *Famous Scottish Trials*, 96, though on the objection of defence counsel Mary Paterson was also called as a witness and gave her own account of her sufferings: *ibid.*, 115. See also (in less detail) (1865) 5 Irv. 88, 98, 105.

⁷⁷ See note 40.

⁷⁸ (1881) Browne & Stewart, *op. cit.* 542 (*infra*). *Notable British Trials*, 40, 50, 54, 55.

arsenic, her statements as to past symptoms were admitted only because made in B.'s presence.⁷⁹

It is submitted that the apparent lenience in most of the poisoning cases is due in part to the continuous nature of the transaction (for even where the poison is not cumulative, *e.g.*, strychnine, the murderer often weakens his victim by several doses), and in part to the indirect method used, in that the victim may well drink the poisoned draught in the poisoner's absence, or even if he is present may feel no immediate symptoms and not realise that anything is wrong until he has gone. It is in such circumstances that the suggestion of Lord Moncrieff that the event will vary as regards its commencement and its termination with the share in the event taken by the declarant is particularly apposite. His Lordship remarks that as to the victim it may extend to a change of scene after recovery of consciousness in an infirmary.⁸⁰ This particular illustration is of doubtful validity,⁸¹ but if it is modified, to a change of scene after the potion which the victim has imbibed begins to make its presence felt, there would be no objection. The two cases may seem analogous, but it is submitted that the supervening unconsciousness interrupts the transaction in a way that the ingestion of the poison does not.

The continuity of the transaction in a case where poisoning by the administration of several doses is alleged is not so obviously unbroken as in the case of an indictment for murder of a child by slow starvation against those in charge of it, when as in *R. v.*

⁷⁹ (1922) 16 Cr.App.R. 118 (Court of Criminal Appeal). The statement is then evidence against him to the extent that by his conduct he has admitted it (see note 24). But Cross asks what inference of guilt can be drawn from a husband's failure to comment on his wife's complaints about the ill effects of medicine he has procured: (1956) 72 L.Q.R. 114. It certainly does seem that an innocent man would say nothing in the circumstances, whereas a poisoner might well say: "I put nothing in it." It is submitted that the courts should not be too astute in thinking up apt comments the accused might have made. In *Gilbert v. R.* (see note 26), the "hold on boys" case, the victim, after G. had been apprehended said: "Don't let him knife me." The lower court held that this statement was inadmissible as not susceptible of denial, but the Supreme Court of Canada held that G. might well have been expected to say that the deceased was in no danger from him. The attitude of the lower court is to be preferred.

⁸⁰ In *O'Hara v. Central S.M.T. Co.* (see note 54) at pp. 389-390. For the operation of this test where the commencement of the transaction is concerned (see *infra*).

⁸¹ See *Pincus v. Solomon* [1942] W.L.D. 237, where a South African court rejected a statement made three minutes after a road accident by a semi-conscious victim on the way to hospital. Of course such a ruling, advisable as it seems, gives an advantage to a wrongdoer who renders his victim unconscious. Similarly Cockburn C.J. pointed out that Bedingfield was at a disadvantage compared with Mrs. R., for while both had suffered throat wounds his had rendered him speechless for twenty-four hours, whereas she had retained the power of speech and could at once give her version of the story: (1880) 15 L.J. 16.

Conde,⁸² witnesses can prove that the child asked them for bread. The interruptions are however often due to lack of opportunity, and it is submitted that even where the doses do not follow as continuously as in *Palmer* or *Madeleine Smith*, nevertheless if it is a case where similar fact evidence is admissible to establish the main fact, declarations accompanying a previous similar fact can be received under the *res gesta* principle, as in *R. v. Barlow*,⁸³ where the deceased's sarsaparilla complaint immediately following the accused's visit a week before her death was received, or in *R. v. Barney*, where the victim's expression of fear that Mrs. B. would commit suicide, just after she was alleged to have shot at him three weeks before the final tragedy, was admitted.⁸⁴ These cases relate to declarations following closely after the relevant incident, close enough to fall within Thayer's principle, but do not decide the question whether two similar facts can be connected by a declaration contemporaneous only with one of them. This was permitted in *B. v. Lamson*, where L. was charged with the murder of his schoolboy brother-in-law by administering aconitine on December 3. That day L. visited the boy at his Wimbledon preparatory school, and gave him a quinine pill. Shortly after he had left, the boy said he felt as if he had an attack of heartburn. Despite the objection of L.'s counsel, Hawkins J. ruled that he could receive anything with regard to his symptoms.⁸⁵ The headmaster, who was recounting this episode, then described how the boy had said that he felt the same as when L. had given him a pill at Shanklin. This was a reference to the preceding August 27: the prosecution led evidence to prove purchase of aconitine by L. near that date, his presence in Shanklin, and the subsequent illness of the boy. The Indian case of *Khijiruddin v. K.E.* is however not easily distinguished from *Lamson*. K. and another were charged with abducting S. The prosecution case was that they had abducted her in February, 1923, and after she had escaped had again abducted her in March, 1923, from a railway station. She remained with them for a year, again escaped and was abducted a third time from a railway station in March, 1924. Biseswar, her husband, was allowed to state that he and Bonomali, his father-in-law, were on the platform, when Bonomali, who was not called as a witness, hearing the voices of the accused, said:

⁸² (1867) 10 Cox 547.

⁸³ See note 40.

⁸⁴ See note 41.

⁸⁵ (1881) *Notable British Trials*, 40. For the boy's remarks to other witnesses, see pp. 50, 54, 55. One witness, Dr. Berry, seems to have elicited the remark from the boy by a leading question (55). One suspects that this is because the Headmaster had already told the doctor the complaint the boy had made; it does not necessarily indicate that the original complaint to the Headmaster was prompted by a leading question.

“Biseswar, destruction has come about. Those ruffians who a year ago took away S. have again come. Let us be off, caste and honour are at stake.” On appeal a Divisional Bench of the Calcutta High Court held the evidence inadmissible, as by no stretch of the imagination would the area of events, which could be taken as covering the *res gesta* of the present occurrence, extend to what happened in the earlier occurrence.⁸⁶ It is submitted that the *Lamson* decision is to be preferred. While the weight of the evidence in the Indian case was not so great, it was technically admissible, though the judge might have exercised his discretion to reject it as of little value but highly prejudicial to the accused. In Canada it has been held permissible to connect two incidents by a *res gesta* declaration, but in this case both occurred within the space of an hour, and really formed one continuous transaction. W. was charged with the murder of his sister-in-law Win. He was alleged to have attacked her one night at her house. She managed to telephone the police, but fled with her thirteen-year-old son, Douglas, to the house of a friend, Mrs. M. Mrs. M. testified that for about twenty minutes Win. sobbed out the story of what had happened, and then someone was heard moving outside. Douglas put up the blind, but Win said: “Oh Douglas, don’t do that, he will shoot.” With that a bullet came through the window, and mortally wounded Win. The court accepted Mrs. M.’s evidence, not as positive evidence of the facts related by Win, but in corroboration.⁸⁷

(To be concluded.)

⁸⁶ (1925) 53 Cal. 372, 385. Bonomali was as sensitive on a point of honour as Falstaff: apparently he and Biseswar fled incontinently, for they are described as a precious pair of poltroons.

⁸⁷ *R. v. Wilkinson* [1934] 3 D.L.R. 50. Supreme Court of Nova Scotia. There is a view that *res gesta* evidence can never be used except to corroborate or explain: Phipson, *op. cit.*, 69. It is submitted that there is no sufficient authority or principle in favour of any such limitation, though the judge may well exercise his discretion in favour of rejection of prosecution evidence offered as part of the *res gesta* to prove the inception of the transaction, and otherwise uncorroborated—see *infra*.

LAND CHARGE REGISTRATION REVIEWED

H. W. R. WADE

IT IS not often that an expert committee, asked to report on a technical problem, have to admit defeat. But the Lord Chancellor's Committee on Land Charges, in their recent Report,¹ confess that to rectify the 1925 machinery of registration, now that it is more than thirty years old, is a task beyond the wit of man. When so eminent a committee as that which sat under Mr. Justice Roxburgh reach such a conclusion, one may be sure that the law has thrown up an exceptionally tough conundrum. And it is of general interest that such things can happen. If the inventions of one generation of legislators fail to justify themselves, the next generation should be able to amend them, at any rate where the difficulties are purely technical and there are no questions of policy. But Lord Birkenhead and Sir Benjamin Cherry appear to have succeeded in creating the conveyancing equivalent of a Franckenstein's monster, which with the passing years would become not only more dangerous but also more difficult to kill.

The Report nevertheless contains plenty of valuable suggestions. In the first thirty years of the new system of registration many defects have come to light, and the Committee have attacked a number of familiar conveyancing problems. Of outstanding interest are their conclusions that registration of restrictive covenants should be discontinued, that the so-called rule in *Re Forsey and Hollebone's Contract*² should be abolished, and (more tentatively) that the reversal of the rule in *Patman v. Harland*³ by section 44 (5) of the Law of Property Act, 1925, was a mistake. These by themselves are important as well as wise recommendations, but they by no means exhaust the list. Perhaps, then, this is an opportune time for some discussion of the salient problems of land charges and of the Committee's proposals.

No one who has meditated on this subject will have failed to notice its curious atmosphere of unreality. A great deal of professional ingenuity has been spent on the legislation relating to conveyancing, giving it the outward appearance of an exact science, subject to rigid principles and precisely detailed rules. In fact both

¹ Cmd. 9825, July, 1956. Subsequently cited as "Report."

² [1927] 2 Ch. 379.

³ (1881) 17 Ch.D. 353.

the main principles and the detailed rules go radically wrong at a number of points—to take but two of the above examples, the rule in *Re Forsey and Hollebone's Contract* makes it quite unsafe for a purchaser to bid for land at an auction, and section 44 (5) of the Law of Property Act, 1925, by reversing the rule in *Patman v. Harland*, appears to destroy the security of most equitable mortgages, and of all pre-1926 restrictive covenants, if the land is let on lease after 1925. These are not merely inelegancies; they contradict the fundamental principles on which the law of real property rests, and create insecurity of property by throwing most serious risks upon people who enter into everyday transactions. Yet no one seems to notice. Bad law should produce hard cases, yet in thirty years there have scarcely been three reported. Nor does there seem to be much private complaint. It is interesting, for example, to read that the Committee have heard of no case where the acceptance of a short title has adversely affected a purchaser; and, incidentally, this suggests that the shortening of the minimum period to twenty years, recommended by the Royal Commission on Land Transfer in 1908,⁴ was not over-bold. People who deal in land, it seems, are quite unconscious of the dangers which the law has suspended over their heads. This is no doubt due to the integrity and care with which they and their advisers act; conveyancing is done mostly by solicitors acting on common-sense principles, with no unhealthy concern for the letter of the law. But that this very satisfactory degree of security should be attained in spite of, rather than because of, the provisions of Parliament is not very creditable. Nor, presumably, does it improve the chances of persuading the Government that the Committee's admirable suggestions for reform should be carried into effect by legislation.

The discussion can now be conveniently divided into three parts, corresponding to the Committee's threefold terms of reference, which were as follows⁵—

“To consider the position which will arise on or after the 1st January, 1956, under the Law of Property Act, 1925, particularly sections 43, 44, 198 and 199 and the Land Charges Act, 1925, when the Land Charges Register will have been in existence for more than 30 years and a purchaser of land under an open contract may not be entitled to call for a root of title earlier than that period of time; and to advise whether any, and if so what, amendments of the law ought to be made before the said date.

⁴ Cmd. 424, 1908, p. 7.

⁵ Report, para. 1. The Committee was constituted on October 1, 1954.

“To consider the judgment of Eve J. in *Re Forsey and Hollebone's Contract* and to advise whether, in the light of the dicta therein contained, any, and if so what, alteration in the law affecting vendors and purchasers is requisite, with particular reference to the proposals in the Report of the Committee on Local Land Charges for enlarging the scope of matters registrable as local land charges.

“To advise whether any, and if so what, amendments should be made in the law affecting the liability of lessees and assignees of leases in respect of land charges registered against their landlords.”

THE POSITION IN AND AFTER 1956

It has been obvious from the first that nemesis would overtake the central register in 1956. It was set up in 1925 in the inherently faulty form of a name-register, where charges would be registered against the names of the owners of the land affected, without reference to any map or plan. A name-register can operate only as an adjunct to the traditional investigation of title for unregistered land: the title deeds reveal the names of the various estate owners, and searches are made against all of them. All registered charges can thus be brought to light, and it can fairly be provided that registration shall constitute notice to all comers. But a crisis arises as soon as the system is old enough for names, against which charges may be registered, to lie behind the root of title, for then a purchaser inspecting the title may have no means of discovering the name against which he must search. To provide that he shall be deemed to have notice of what he cannot discover is on the face of it unreasonable.

Of course, the assumption on which the law as to investigating title is founded is that the blind eye may safely be turned to most events anterior to the root of title. In practice, therefore, the risk of trouble arising from some such transaction is small. Yet in theory at least the operation of the existing system of registration is more objectionable than the operation of the general law, for a registered charge of which all the world has statutory notice remains a perpetual incumbrance for as long as it subsists; an unregistrable equity, on the other hand, if it is not apparent from the title and the purchaser is otherwise ignorant of it, is defeated by a transfer of the legal estate to a purchaser. Thus the tendency of the general law is to clear titles, while the tendency of the registration machinery is to clog them.

Accordingly there is much sense (if one may respectfully say so)

in the amendment advocated by the Chief Land Registrar and also by the Deputy Treasury Solicitor, that the statutory notice resulting from registration should cease to operate as regards charges registered before the date of the root of title, provided of course that a full inspection of title was made.⁶ This would not solve the major problem, which is to ensure that all registered charges are at all times ascertainable. But that is the problem which the Committee found to be insoluble, as must be explained; and, in the absence of a solution, it is surely preferable that the same general principles which govern unregistrable charges should also govern registered charges which have reached such an age that the registration machinery can no longer cope with them properly. The protection of charges must depend either upon the general law or upon registration; and when registration can no longer operate as it should, equitable interests such as estate contracts and restrictive covenants are most appropriately relegated to the general doctrines of equity from which they sprang. The Committee dispose of this by saying "We think that this proposal merely transfers the hardship from the purchaser to the chargee, and we do not know why the chargee, who has done all that is required of him by the Act of 1925 to acquire his vested right, rather than the purchaser, should pay the price of a fault in the system."⁷ The answer, perhaps, is that where the ethics are equal the purchaser should prevail, for the policy of the law is to favour alienability and clean titles. But, of course, there are certain legal interests such as easements and rent-charges which will bind an innocent purchaser at any distance of time, and there is no compelling reason why superannuated registered charges should not be classed with them—as is, in effect, the Committee's proposal. Since, furthermore, the risk of purchasers getting unpleasant surprises from charges registered prior to the root of title appears in practice to be negligible, the most sensible if not the most elegant solution may be to do nothing.

The insoluble major problem might be canvassed at great length, but since the difficulties are more of an administrative than of a legal nature it will not be allotted much space here. The real answer to it, as the Committee do not fail to point out,⁸ is to complete the compulsory registration of title throughout the country under the Land Registration Act, 1925. They suggest that the faulty land charge system of 1925 was enacted in the belief that the title to all land would be registered within the following thirty years.⁹ But

⁶ Report, para. 21.

⁷ *Ibid.*

⁸ Report, paras. 4, 22.

⁹ If this was the assumption, it was optimistic, since it was intended that nothing should be done in the first ten years: see next note.

now, as they say, we are at the end of that period and it is open to doubt whether registration of titles will be completed within the *next* thirty years. The dilemma which faced them was therefore the penalty of hastening slowly with the reform in which this country has always been behindhand, the comprehensive registration of titles. There has been a trickle of compulsory registration orders since the war,¹⁰ but it is hard to imagine why a programme and timetable cannot be prepared for dealing with the whole country. The excuse that there are no adequate maps can hardly still be valid, if indeed it ever was,¹¹ since it has been announced that the 50-inch revised maps of urban areas should be complete by 1963.¹² But registration of title was not within the Committee's terms of reference, and they were forced to turn to other possibilities.

It is quite impracticable to convert the present central register from a name register to a register which identifies the land. But it might be possible, as was suggested to the Committee, to transfer the registration of land charges to local registries. The Registries of Local Land Charges, which were set up in 1925, have the great merit that they register charges against the land, by reference to maps or plans, rather than against the names of owners. Local registers can therefore be searched without reference to title deeds, and the problem of discovering charges older than the root of title does not exist. It is plain, furthermore, that local land charges are rapidly increasing in number and importance. Indeed, the list of local land charges is now much more formidable than the list of charges registrable centrally under the Land Charges Act, 1925.¹³ Planning alone must provide a daily stream of new entries, for it seems that all conditions attached to planning permission (and conditions are probably attached more often than not) are registrable in the local register.¹⁴ It is striking to compare the thriving and healthy local land charge system, as described in the Report of

¹⁰ Surrey (S.I. 1952, No. 395); Oxford (S.I. 1953, No. 881); Canterbury and Kent, to become effective by stages in the period 1957-1961 (S.I. 1955, Nos. 956, 957); Oldham (S.I. 1955, No. 1804); Leicester (S.I. 1956, No. 826). The pre-war compulsory areas were London, Middlesex, Eastbourne, Hastings and Croydon. The memorandum prefixed to the Law of Property Bill, 1922, proposed that there should be a ten-year standstill in which the merits of registered and unregistered conveyancing might again be compared. But the order for Hastings was made in 1928 (S.R. & O. 1928, No. 253).

¹¹ The Scott Committee consulted the Ordnance Survey but were not told that mapping would present great difficulties: Cmd. 424, 1919, p. 23. But see Stewart-Wallace, *Principles of Land Registration*, 81, and Chap. VII.

¹² *The Times*, December 29, 1954.

¹³ See the table of charges in Garner, *Local Land Charges*, 99-106. Numerous additions are proposed by the Committee on Local Land Charges: Cmd. 8440, 1952, p. 41.

¹⁴ Garner, *Local Land Charges*, 36. But this does not extend to conditions imposed by the Minister as opposed to the local authority: see Report of the Committee on Local Land Charges, Cmd. 8440, 1952, p. 62.

the Committee on Local Land Charges of 1952,¹⁵ with the tottering system of the central register, which already at the age of thirty is in senile decay. Why should not the registration of puisne mortgages, estate contracts, etc., be transferred to local registries which are already equipped with efficient machinery? The transfer could be made all the more easily if the need to register restrictive covenants and some other charges were abolished simultaneously, in the manner discussed below.

The rock on which this project founders is evidently the transitional difficulty.¹⁶ What could be done with the two million charges already registered, which fill ten thousand volumes at the central registry?¹⁷ Even if the herculean labour could be faced, the central registry could not transfer them since it cannot say what land they affect. Nor can their owners be called upon to re-register them locally, for there is no means of knowing whether the chargee named in the original registration is still the owner of the charge. And, as the Committee say,¹⁸ very many will have died or have changed their addresses, and even among those who did receive a notice many would fail to re-register for excusable reasons. No doubt the question is one of perspective. If the task now were to provide a sound system for the next century or so, there would be much to be said for localising future entries and leaving those of the period 1926–1955 to look after themselves, like charges created before the days of registration. But since the task is rather to hold the line until registration of titles is completed, there may well be no merit in setting up new machinery which will not assist the existing entries. The benefits of local as against central registration would not be felt until after 1985, since all *future* entries will be effectively protected by name-registration for thirty years at least. One can only regret that local registration was not given a monopoly thirty years ago.

What are the other possibilities? Re-registration of charges after thirty years is not really feasible, for it would only be of use if the re-registration were made against the estate owners for the time being, and who he is may not always be easy to discover; there would be bound to be very many lapses of memory, and there could be no assurance that reminders sent out by the registry would reach the right people. As in the case of the charges already registered, these objections are overwhelming.¹⁹

An equally objectionable suggestion is that vendors should be obliged to furnish a list of the estate owners since 1925. As the

¹⁵ Cmd. 8440.

¹⁷ Report, paras. 10, 18.

¹⁹ *Ibid.*

¹⁶ Report, paras. 18, 19.

¹⁸ Report, para. 18.

Committee say,²⁰ many vendors who had themselves accepted short titles would be unable to comply, and the period for investigation of title would in effect prolong itself by one year annually, contrary to the policy of modern legislation and practice, which is to shorten the period as much as possible. It would certainly be a mistake to make 1925 a kind of limit of legal memory, like 1189. The Committee likewise reject another proposal which runs counter to the theory of conveyancing, namely that a vendor should be liable in damages for loss caused by undiscovered charges registered before the root of title.²¹ In this case "Peter would be robbed to pay Paul for something for which neither was to blame,"²² and an inroad would be made upon the general principle that a vendor, having proved his title, and conveyed the land, disposes of the risk along with the property and can safely spend the purchase money. To make him guarantee the title against such contingencies would be a step back towards the medieval law of warranty.

The Committee are thus led to the despairing conclusion that "we are the inheritors of a transitory system which was bound to disclose this defect after 30 years of transition and it seems too late to disclaim our inheritance."²³ "The only policy which we can recommend is to press on as quickly as may be with the extension of the system of compulsory registration of title."²⁴ Until registration of title comes to the rescue, therefore, the best policy is thought to be to leave registered charges with the full protection of section 198 of the Law of Property Act, 1925, so that all persons are deemed to have notice of them. The maxim *caveat emptor* will have a new and minatory shade of meaning, for it does not help to tell a purchaser to beware of what he is unable to discover. His consolation is that the practical dangers appear to be small.

The disease itself being incurable, can its spread be confined? It is here that the Committee are able to make useful suggestions, particularly with respect to restrictive covenants.

Name-registration is a perfectly suitable method of protecting charges which have a limited expectation of life. An ideal case is that of estate contracts. A contract for sale or lease creates a charge which does not appear on the title to the land, and which needs protection for the period between contract and completion. Otherwise the vendor may double-cross the purchaser by selling elsewhere, perhaps at a higher price, and if the land is thereupon conveyed by deed the second purchaser may acquire the legal estate

²⁰ Report, para. 20.

²¹ *Ibid.*

²² *Ibid.*

²³ Report, para. 22.

²⁴ *Ibid.*

without notice of the first purchaser's interest and so defeat it. There may be problems over long-term options,²⁵ which may conceivably outlast the period of title, and over sub-sales, where a sub-purchaser wishing to register may not know who is the real vendor in whom the legal estate is vested; but everyday contracts for sale or lease, due to be completed within a short time, are just the interests which name-registration best protects. Paradoxically it is this class that solicitors make a practice of *not* registering. Why it should be their collective practice to run this risk is a mystery, but the Land Registry must be grateful that they do not, for the volume of entries would be enormous, and "dead wood" would accumulate in the registry as fast as contracts were completed. As things are, estate contracts registered in 1954 totalled only 13,360 out of 92,194 entries in all classes.²⁶

But restrictive covenants are very different. In the first place, they are permanent restrictions, commonly imposed in order to control the use of land over an indefinitely long period.²⁷ Hosts of covenants imposed before 1926 are still in full vigour, though they are not registrable and depend for their protection on the old doctrine of notice. Secondly, restrictive covenants are almost always squarely on the title, for they come into existence as part of the terms of some disposition of the land, and so appear in the conveyance or lease. Moreover, once they have been created it is in practice obligatory to refer to them in every subsequent conveyance on sale, in order that the vendor may restrict the operation of his covenant for title.²⁸ Accordingly there is virtually no danger that a purchaser investigating title will fail to discover them. No one would suggest that covenants made before 1926 are in practice less secure than covenants made since 1925; indeed, it is probably covenants created since 1925 which are in the greater peril, since if the owner of the benefit has failed to register, the covenant may be defeated by a sale of the land, however clearly it stands on the title. What is more, two radically different systems of law are at present maintained concurrently: pre-1926 covenants are still under the old law, which depends upon notice, while post-1925 covenants are under the new law, which depends upon registration. Both are very

²⁵ But since these are almost certain to be options contained in leases they come on to the title and in practice need no additional protection: see below, note 42.

²⁶ Report, para 9.

²⁷ It is of interest that Sir A. Underhill proposed to the Scott Committee that restrictive covenants should become unenforceable after 50 years: Cmd. 424, 1919, p. 38; but the Committee preferred the scheme now embodied in s. 84 of the Law of Property Act, 1925: *ibid.*, p. 7.

²⁸ The covenant is against incumbrances "other than those subject to which the conveyance is expressly made," although the covenantor is not answerable for incumbrances created by predecessors in title if there was an intervening purchase for value: Law of Property Act, 1925, Second Schedule, Part I.

numerous, and the state of the law is untidy. There would seem to be wisdom in the Committee's remark that "it is worthy of consideration whether Class D (ii) should not be closed and the system applicable before 1926 reinstated for the future."²⁹ In order to provide for the occasional case where a restrictive covenant is created independently of a disposition of the land, and so does not come on to the title (as may be the case, for example, with covenants made with the National Trust), it is suggested that there should be a right to indorse one of the title deeds,³⁰ a device which is already available for some purposes.³¹ It would do nothing but good if restrictive covenants could be deregistered in this way. It would probably halve the number of entries which the Land Charges Department have to effect, for in 1954 restrictive covenants amounted to 46,791 out of a grand total of 92,194.³² The Committee "hesitate to describe it as a recommendation,"³³ perhaps because it does not solve the problem submitted to them. But if ever there was a case for abandoning name-registration, this is it.

In similar vein the Committee "throw out a suggestion in passing" that all mortgages not protected by deposit of documents of title should be registrable in Class C (i) as puisne mortgages, and that Class C (iii)—general equitable charges—should be closed.³⁴ This also would be salutary. Instead of dividing unprotected mortgages between C (i) (if legal) and C (iii) (if equitable) they would be neatly assembled together in C (i). Another and more substantial advantage would be the removal of the vague class of "general equitable charges," at present defined in negative terms as all charges not protected by deposit of documents or arising under a trust for sale or settlement.³⁵ A sweep-up clause of this kind is likely to prove a trap, and it is probably better policy—especially when the penalty for non-registration is so drastic³⁶—to make the list of registrable charges finite and clear. Of the charges other than mortgages which Class C (iii) may comprise, equitable annuities outside trusts for sale and settlements must be extremely rare, even if only because most kinds of annuity charged upon land make it settled land.³⁷ A vendor's lien for his purchase-money is an example

²⁹ Report, para. 11.

³¹ See s. 200 of the Law of Property Act, 1925, concerning land held on a common title with other land.

³⁰ *Ibid.*

³² Report, para. 9.

³³ Report, para. 7.

³⁴ Report, para. 13.

³⁵ Land Charges Act, 1925, s. 10 (1) Class C (iii).

³⁶ An unregistered general equitable charge is void against a purchaser of the land or of any interest in it (Land Charges Act, 1925, s. 13), notwithstanding notice (Law of Property Act, 1925, s. 199 (1) (i)). The severity of this rule is criticised below.

³⁷ Settled Land Act, 1925, s. 1 (1) (v).

of the sort of charge which Class C (iii) probably covers, but which the vendor concerned may well not realise is registrable. This penumbra of uncertainty should have no place in the system, and occasional equities would be better left to the tenderer mercies of the doctrine of notice, which is at least a principle of equity in the ethical as well as in the technical sense.

It is welcome to find that, before leaving mortgages, the Committee favour ironing out one more awkward wrinkle of the Land Charges Act, 1925, and making it clear that equitable mortgages which *are* protected by deposit of documents are *not* registrable in any class.³⁸ This of course was the general intention of the Act; but there is the disagreeable possibility that equitable mortgages may fall within the definition of estate contracts,³⁹ since the foundation of an equitable mortgage is a contract (which is often express)⁴⁰ to create a legal mortgage.⁴¹ It may be that equitable mortgages by deposit of deeds can escape from the definition. But if they cannot, they will mostly be void against purchasers for want of registration, since in practice they are naturally not registered. No case has been reported, and this doubtful point is yet another of the uncharted reefs on which no one appears yet to have been wrecked.

Further helpful suggestions for confining registration within more reasonable bounds are that options contained in leases should not be registrable⁴² (at present they are estate contracts, but registration is quite unnecessary since they are as much on the title as any other terms of the lease); and that Class D (iii) (equitable easements) might be abolished.⁴³ It has always been rather

³⁸ Report, para. 16.

³⁹ "Any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate . . .": Land Charges Act, 1925, s. 10 (1) Class C (iv).

⁴⁰ An equitable mortgage by deposit of deeds is commonly accompanied by a memorandum of charge which contains a promise to execute a legal mortgage if required by the mortgagee.

⁴¹ As early as 1926 it was pointed out that express undertakings required registration: Prideaux, *Precedents in Conveyancing*, 22nd ed., ii, 259 (Sir B. Cherry was a joint editor of this edition); the question whether all equitable mortgages are registrable was discussed by Lightwood in (1930) 69 L.J. News. 227 and by R. E. Megarry in (1940) 7 C.L.J. at 250-251. Lightwood's opinion was that registration ought not to be required, even where there was an express undertaking, since the whole transaction was primarily an equitable charge, not an estate contract, and equitable charges protected by deposit of deeds are not registrable. But Mr. Megarry points out that the statutory definition is hard to escape, especially where there is an express undertaking. Nevertheless it is possible that the equitable mortgage, though it began life as a contract for a legal mortgage, has by now become a distinct form of charge; it would be a tempting conclusion, since it would protect "protected" mortgages, and preserve the evident scheme of the Land Charges Act. (S. 13 of the Law of Property Act, 1925, does not assist since it does not extend to the Land Charges Act.)

⁴² Report, para. 15.

⁴³ Report, para. 16.

a mystery what equitable easements are.⁴⁴ Contracts to create easements can just as well be registered as estate contracts. What else is left? In fact, nearly two thousand equitable easements were registered in 1954,⁴⁵ and one may wonder whether licensing agreements and other uncertain quantities are finding a home here. It would be more satisfactory to close the class, for it is just as objectionable on the score of vagueness as is that of general equitable charges.

That this considerable pruning should be the best treatment for the Land Charges Register indicates that the scheme of 1925 was over-ambitious as well as inherently defective. Before 1926 registration was required only for certain special kinds of charges, such as pending actions,⁴⁶ writs and orders,⁴⁷ deeds of arrangement⁴⁸ and statutory charges (corresponding to the present Class A).⁴⁹ It is true that some kinds of annuities were registrable,⁵⁰ but they were a narrow class,⁵¹ and had been made registrable as early as 1777 in order to prevent a kind of fraud which became popular in the eighteenth century.⁵² A few of the commoner transactions, such as estate contracts and unprotected mortgages, are suited to name-registration. But the wholesale extension in 1925 was a mistake, the effects of which are aggravated by the ineradicable weakness of name-registration as a system. It was truly said by a former Chief Land Registrar that "the 1925 legislation endeavoured to apply on a colossal scale a system which was inherently defective even to meet the small demands up to that time made upon it."⁵³

Certain other criticisms of the scheme of 1925 may be ventured at this point, though they go beyond the ground covered by the Committee. One important question is whether it is right to exempt a purchaser from a registrable but unregistered charge when he takes

⁴⁴ See *Lewisham B.C. v. Maloney* [1948] 1 K.B. 50 (C.A.); G. Cross, *The Bell Yard*, No. XV; C. V. Davidge (1937), 53 L.Q.R. 359; and also (1948) 64 L.Q.R. at p. 58, note 6.

⁴⁵ Report, para. 9.

⁴⁶ Judgments Act, 1839, s. 7; *Lis Pendens* Act, 1867, s. 2.

⁴⁷ Land Charges Registration and Searches Act, 1888, s. 5.

⁴⁸ *Ibid.*, s. 7.

⁴⁹ *Ibid.*, s. 4 (defining "land charge").

⁵⁰ Judgments Act, 1855, ss. 12, 14.

⁵¹ Annuities created by marriage settlement or will were excluded.

⁵² 17 Geo. 3, c. 26, reciting that "the pernicious Practice of raising Money by the Sale of Life Annuities hath of late years greatly increased and is much promoted by the Secrecy with which such transactions are conducted." This Act was replaced by 53 Geo. 3, c. 141 (1813), repealed along with the usury laws by 17 & 18 Vict. c. 90 (1854). But after a short interval registration was restored by the Judgments Act, 1855 (above, note 50).

⁵³ Sir John Stewart-Wallace in (1931) 75 S.J. 807. It may be observed that registration on this sweeping scale was no part of the original Underhill-Cherry scheme as recommended by the Scott Committee. They suggested registration only for death duty charges, petitions in bankruptcy and disentailing assurances: Cmd. 424, 1919, pp. 44, 46. Disentailing assurances are of course no longer enrollable: Law of Property Act, 1925, s. 133.

with actual notice of it. The policy of 1925 was to abandon the equitable principle of notice in favour of the mechanical principle of registration. This was a shift from a moral to an a-moral basis. Its justification was that the doctrines of constructive and imputed notice had been over-refined, "to such an extent that it had become dangerous to employ in a purchase a solicitor of good practice and reputation."⁵⁴ But those difficulties could be avoided without the defiance of ethics which occurs when a purchaser with *actual* notice is allowed to disregard a third party's rights. This is putting an unreasonable penalty on the venial fault of non-registration. Under earlier Registration Acts the courts always struggled to reconcile them with the spirit of equity, even to the extent of holding a deed made "void against any subsequent purchaser" to be valid against a purchaser with *constructive* notice.⁵⁵ A similar interpretation was given to the father of all Registration Acts, the Statute of Enrolments, 1535.⁵⁶ Between the two extremes of making all notice relevant, or all notice irrelevant, lies the middle road of making actual notice relevant, but not constructive notice. The benefits of registration can be obtained, and unconscionable results also avoided, by providing that an unregistered charge shall be void against a purchaser provided that he or his agent (acting as such and in the same transaction) had not actual notice of it.

But there is one case where even constructive notice ought to be respected: where the owner of the charge is in possession of the land. The 1925 legislation has destroyed much of the protection which used to be given, and rightly, to equitable owners in possession. They can, it is true, protect themselves by registration. But in practice they will often fail to register, quite excusably, and it is unrealistic to maintain that their position has not been gravely weakened. Take the case of a tenant who is let into possession under an agreement for a lease. Under the old law he was safe, for no later purchaser could secure the legal estate from the landlord without at least constructive notice of the tenant's interest. But today, unless he registers an estate contract, the tenant will be defeated by any later purchaser of a legal estate.⁵⁷ It is safe to

⁵⁴ Jessel M.R. in *Greaves v. Tofield* (1880) 14 Ch.D. 563 at 565.

⁵⁵ *Le Neve v. Le Neve* (1747) 436; another such decision is *Greaves v. Tofield* (above). But in some cases notice was made irrelevant by statute, e.g., Judgment Registration Act, 1855, ss. 4, 5, 10.

⁵⁶ Lord Chancellor Hardwicke in *Le Neve v. Le Neve* (above) at p. 442.

⁵⁷ For examples of the rights of tenants in possession being defeated by later purchasers see *Wright v. Dean* [1948] Ch. 686; *Sharp v. Coates* [1949] 1 K.B. 285 (C.A. The decision is open to question on grounds not here material); *Hollington Bros., Ltd. v. Rhodes* [1951] 2 All E.R. 578, note. In each of these cases the later purchaser had actual notice of the tenant's rights. The first and last of them throw much of the hardship on to the lessor, by holding him to be in breach of contract, although if the tenant had registered (or if his

guess that very few people in such a position register their interests, bearing in mind, as already noted, that solicitors commonly do not register estate contracts. The anomaly is all the more glaring when compared with the rules for land with registered title. Under the Land Registration Act, 1925, all purchasers are bound by overriding interests, and overriding interests include "the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed."⁵⁸ It is capricious to have two such radically differing principles for protecting owners of charges who are in possession. The rule for registered land is much more reasonable, for possession is the strongest possible title to security. Unfortunately section 14 of the Law of Property Act, 1925, which is a saving for interests of persons in possession, is too restricted in its effect to be of help.⁵⁹ A learned Lord Justice of Appeal has indeed expressed the opinion that it will avail against non-registration,⁶⁰ but in the face of the express terms of the legislation he would be a bold spirit indeed who would rely upon it. For more timorous souls the law must be taken as it appears to stand in the Acts, and as it has been expounded by a learned judge of the Chancery Division.⁶¹

RE FORSEY AND HOLLEBONE'S CONTRACT

The second subject of the Committee's terms of reference, the notorious passage in the judgment of Eve J. in *Re Forsey and Hollebone's Contract*,⁶² was discussed at some length in an earlier article.⁶³ All that need be done here is to extend a welcome to the Committee's recommendations for reform. The difficulty, it may be remembered, is that Eve J. held that a purchaser is not entitled to object to a registered incumbrance which the vendor is unable to remove (such as a restrictive covenant) on the ground that, having statutory notice of it, he is in the same position as a

interest had not been registrable) he would have lost nothing. In the last case, furthermore, the sale was expressly made subject to the rights of the tenant, but Harman J. held that even this could not affect the penalty imposed by s. 13 (2) of the Land Charges Act, 1925. Thus all parties suffer except the one who is equitably responsible, *viz.* the purchaser who bought with clear notice of the tenant's rights.

⁵⁸ Land Registration Act, 1925, s. 70 (1) (g). See *Mornington Permanent Building Society v. Kenway* [1953] Ch. 382.

⁵⁹ s. 14 applies only to Part I of the Act, *i.e.*, ss. 1-39, none of which are here material.

⁶⁰ Denning L.J. in *Bendall v. McWhirter* [1952] 2 Q.B. 466 at 483; criticised by R. E. Megarry in (1952) 68 L.Q.R. at p. 385.

⁶¹ Harman J. in *Coventry Permanent Economic Building Society v. Jones* [1951] 1 All E.R. 901 at 903-904.

⁶² [1927] 2 Ch. 379.

⁶³ [1954] C.L.J. 89.

purchaser who contracts to buy having actual knowledge of an irremediable defect in the title, which he is therefore taken to be willing to accept. This doctrine of course strikes at the root of conveyancing practice, since it makes it unsafe for purchasers to follow the normal and proper course of contracting first and investigating title afterwards. Purchasers are therefore driven to search the register before contract (though they usually cannot do so effectively for want of the necessary names) or, better still, to protect themselves by a suitable provision in the contract. Standard conditions of sale include such provisions, but it is not satisfactory to leave purchasers to modify defects in the law for themselves, and there are many occasions, such as auction sales, where they cannot do so.

It seems probable that the opinion expressed by Eve J. was erroneous.⁶⁴ But, as the Committee point out, "it has never been commented on in any other reported case, and it would no doubt be followed by any other judge of first instance."⁶⁵ The Committee stigmatise it as "indefensible," and say ⁶⁶—

"We have no hesitation in recommending that the rule itself should be abolished so far as concerns land charges registered in the central register. Furthermore, we think that any provision in a contract of sale purporting to fix the purchaser in advance with notice of any matters unknown to him which may be registered against the vendor or his predecessors in title in the central register should be declared to be void. No purchaser who was properly advised would ever agree to the insertion of such a provision and no honest vendor would desire its insertion."

As to the manner of abolishing the rule, the recommendation is that section 198 of the Law of Property Act, 1925, should be amended so that registration shall not, as between vendor and purchaser, be deemed to give the purchaser knowledge at the date of the contract of any matter of which he was in fact ignorant. For the protection of the owner of the charge, registration would still constitute notice to all the world. Such an amendment would do much to remove the mischief which can arise from the words of section 198 "actual notice . . . to all persons for all purposes," which so ill accord with the limitations of name-registration. In fact there is only one purpose for which notice ought to be material, namely, for making the charge binding upon a purchaser of the legal estate.*

Local land charges are likewise covered by the proposed amendment. But in that case, since they are registered against the land

⁶⁴ See the article above referred to.

⁶⁵ Report, para. 25.

⁶⁶ Report, para. 30.

itself and it is therefore possible to make an effective search before contract, it is recommended that vendors should be at liberty to contract out, by stipulating that purchasers should be deemed to purchase with notice of all registered local land charges.⁶⁷ Solicitors negotiating contracts for purchasers always search the local register, and if vendors could not escape responsibility for local charges the result might be that both vendors and purchasers would search, thus duplicating the work. The only difficult question is whether this liberty of contracting out should extend to sales by auction, where bidders often act without legal advice. On the whole the Committee conclude that it should, since the risk of hardship, in the light of experience, is more theoretical than real.⁶⁸ Vendors who sell by auction can usually dictate their own terms as to the title, and a provision about local land charges would usually be one of a number of conditions which the vendor would insert in his own favour, and which the purchaser in practice would as often as not never read.

Of the three matters referred to the Committee, this was the only one which admitted of a straightforward answer. It was simply a question of correcting an error, and there were no insoluble dilemmas as in the first and third heads of the terms of reference.

LANDLORD AND TENANT

The field of landlord and tenant contains some particularly exquisite problems, for there the anomalies of the system of name-registration come into conjunction with what may be thought to be the prize aberration of 1925, the provision that exempts a tenant from notice of his landlord's title. That provision, as is well known, was designed to reverse the rule in *Patman v. Harland*,⁶⁹ and is to be found in section 44 (5) of the Law of Property Act, 1925. As a parliamentary attempt to improve upon the judicial wisdom of Sir George Jessel M.R., it cannot be considered a success.

To go through the cumbrous English process of proving title is an unreasonable nuisance if it has to be done every time a short lease is granted. The conveyancing practice was, therefore, that when making a contract for a lease "the freeholder almost invariably bars himself from showing his own title."⁷⁰ In 1874 the Vendor and Purchaser Act saved intending lessors the trouble of making this common-form stipulation by enacting that the intending lessee should have no right to call for the freehold title, or for

⁶⁷ Report, para. 31.

⁶⁸ Report, para. 32.

⁶⁹ (1881) 17 Ch.D. 353.

⁷⁰ Wolstenholme and Cherry, *Conveyancing Statutes*, i, 298.

a superior leasehold title, unless he so contracted expressly.⁷¹ All that happened at this stage was that contracting in was substituted for contracting out. A tenant who was unwilling to take the risk of the title had to bargain for the right to see it; but if he first entered into an open contract, it was of course too late, and that created something of a statutory trap for tenants. *Patman v. Harland*⁷² showed its operation in the case of a restrictive covenant: the tenant did not stipulate for disclosure of title, and so had no means of discovering the existence of the covenant, of which in fact the lessor was equally ignorant. The premises were to be used as an art school, and the tenant was to be at liberty to build a studio in the garden. The studio was nearly completed before it was discovered to be in breach of a restrictive covenant which was clearly on the title. Sir George Jessel M.R. had no hesitation in holding that the tenant had constructive notice of the lessor's title, just as much as if he had taken a lease from a lessor who had expressly contracted out of disclosing it.

In 1919 the Scott Committee recommended that the rule in *Patman v. Harland* should be reversed.⁷³ How it was to be reversed without shattering the foundations of conveyancing they did not say. But when the substance of the provisions of 1874 was re-enacted in section 44 of the Law of Property Act, 1925, there was added the new subsection (5), which laid down that where an intending lessee was debarred by these provisions from inspecting his lessor's title, "he shall not . . . be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice."

If ever a remedy was worse than the disease, it was this provision. For it meant, of course, that the owner of the equitable charge could no longer enforce it against the land, since the tenant could plead purchase without notice. The subsection created a very numerous class of the very people which it was the whole object of the law to eliminate, purchasers of legal estates without notice of subsisting equities. Whenever such a purchaser intervenes there is disaster, for a third person's prior equitable interest in the property is defeated. So far from being "Equity's darling,"⁷⁴ the purchaser without notice was almost hounded out of existence by the Chancellors by their refinement of the doctrine of notice. Only by exterminating him could they make equitable interests into secure rights of property. If he remained at large, equitable

⁷¹ s. 2.

⁷² (1881) 17 Ch.D. 353.

⁷³ Cmd. 424, 1919, p. 7.

⁷⁴ Megarry, *Manual of Real Property*, 2nd ed., 80.

interests would not be worth having. Subsection (5) throws this fundamental policy to the winds, and, merely in order to save inconvenience to lessors, creates the far greater evil of insecurity of property. Why owners of prior charges should thus be sacrificed for a purely secondary convenience to other people is unimaginable.

The simultaneous provisions for registration of land charges, however, go to the opposite extreme. Subsection (5) at least does not exempt the tenant if he has notice *aliunde*, and the statutory notice resulting from registration is therefore just as effective against a tenant as against any other purchaser. This at least was the view expressed by Simonds J. (as he then was) in *White v. Bijou Mansions, Ltd.*⁷⁵ and one may respectfully say that there is every reason to suppose it to be correct. The owner of a charge which is both registrable and registered is therefore completely safe, whether or not the tenant is able to make an effective search of the register; while the owner of an unregistrable charge is in the unprecedented peril that his interest will most probably be destroyed if the owner of the land affected chooses to let it. It would be difficult for a single piece of legislation to embody more contradictory principles.

One or two examples will show the oddities which could result. Suppose that land is subject to two successive mortgages, the first being an equitable mortgage by deposit of title deeds. The first mortgage is then unregistrable, but the second is registrable,⁷⁶ and will be assumed to be registered. If then the owner enters into an open contract to grant a long lease of the land, the absurd result is that the tenant will take free from the first mortgage (unless he hears about it from some other source) but subject to the second. The first mortgagee will then lose his security, and to that extent is expropriated. Similarly with restrictive covenants: if the land is subject to two covenants, one made before 1926 (and so unregistrable) and one made since 1925, which is registered, a tenant who takes a lease without knowledge of the covenants will be exempt from the older one but bound by the younger. Covenants made between landlord and tenant are also unregistrable,⁷⁷ so that such a covenant, even if made since 1925, will be defeated if the land passes to a sub-sublessee, or the assignee of a sublease, unless in either case there is notice *aliunde*. Yet even this discreditable

⁷⁵ [1937] Ch. 610 at 619 (affirmed [1938] Ch. 351, C.A.). The learned judge's opinion was criticised by Dr. D. W. Logan in (1940) 56 L.Q.R. at p. 368 on the ground that subsection (5) should protect the lessee. With all respect, it would seem to be wrong to extend the subsection to any kind of notice obtained *aliunde*; and the narrower the scope of the subsection the better.

⁷⁶ It is possible for two mortgages to be protected by deposit of deeds; but normally if the first mortgagee takes the deeds, the second mortgage will be unprotected and so registrable.

⁷⁷ Land Charges Act, 1925, s. 10 (1) Class D (ii).

state of the law appears to have produced little practical hardship. There has been one reported case of a tenant defeating a restrictive covenant,⁷⁸ and one of an assignee of a lease of registered land being bound by a restrictive covenant which his contract disabled him from discovering.⁷⁹ These at least illustrate the paradoxical policies of 1925. Neither of these mutually inconsistent doctrines can be said to be an improvement on the old doctrine of notice. Together they are an amalgam of repugnancy and injustice.

The Committee's terms of reference were confined to registered charges, so that unfortunately they were not directly concerned with the worst blot in the picture, the operation of subsection (5) in defeating unregistrable charges. But the hint that the law for registered charges might be amended so as to accord with that for unregistered charges—i.e., that subsection (5) might prevail over section 198—gave them an opportunity for considering whether the operation of the subsection might be extended, and it is at least a consolation to find that they did not so recommend. They say that "it could, we think, be argued with equal—and perhaps greater—force that the anomaly should be cured by restoring the rule in *Patman v. Harland*."⁸⁰ Their conclusion is that "it would be better to maintain the existing position—anomalous though it undoubtedly is."⁸¹ Thus no favour is shown to subsection (5). But it is a pity that the Committee's terms of reference did not extend to all aspects of that ill-considered subsection, and therefore left them only with a choice of evils.

Registered land, however, is amenable to treatment. The arguments for preventing tenants from calling for proof of title have little weight when the title is ascertainable from an efficient land registry; they were a concession to the clumsy machinery of private conveyancing. The Committee therefore recommend that the blemish pointed out by Simonds J. in *White v. Bijou Mansions, Ltd.*⁸² should be removed by giving a prospective lessee or assignee of a lease of registered land a right to inspect the charges register of the freehold and any superior leasehold title.⁸³ If this is done,

⁷⁸ *Shears v. Wells* [1936] 1 All E.R. 832.

⁷⁹ *White v. Bijou Mansions, Ltd.* [1937] Ch. 610.

⁸⁰ Report, para. 41. In para. 12 the Committee also remarked that if their recommendation for the deregistration of restrictive covenants was to be effective, the rule in *Patman v. Harland* would have to be restored, otherwise owners of restricted land could defeat covenants by granting long leases. Owners of land subject to pre-1926 covenants can do exactly that as the law now stands.

⁸¹ Report, para. 41.

⁸² The learned judge said "... it may perhaps be a blot, that the lessee, unless he makes some bargain to that effect, is not permitted to inspect the register": [1937] Ch. at p. 621.

⁸³ Report, para. 42.

there will be at least one case where the law will have reverted to its older and wiser principle, that a lessee may investigate title if he pleases, but takes the risk upon his own shoulders if he agrees or elects not to do so.

For the troubles which beset unregistered land the most suitable remedy might well be to require a lessor, just like a vendor, to give a covenant against incumbrances. For why should he have it both ways, neither showing his title nor answering for its defects? But no remedy can be suggested within the Committee's limited terms of reference. Leases vary greatly in their nature. It may be excusable for a tenant for a short term to take the risk of the title. But the law is no different for a 99-year building tenant, who may bid for a plot at an auction or make an open contract and find himself denied any evidence of title at all, although the property is his for life and longer and he is obliged to invest thousands of pounds in building upon it. Subsections (2)–(4) of section 44 are a bed of Procrustes for short and long leases alike; they encourage, and indeed compel, intending tenants under long leases to act with complete recklessness as regards the title.

But the note on which to end is that, fortunately, none of these deficiencies seem to matter in real life. Public control of land is now the dominant subject, and searches for local land charges and inquiries from local authorities (now made on an enormous scale, on an entirely extra-legal basis ⁸⁴) are now of much greater practical importance than the pitfalls and refinements of private conveyancing. If it cannot be said that the Property Acts come through this survey with great credit, at least their failings are surprisingly innocuous.

⁸⁴ The current forms of inquiry were set out in Appendix C to the Report of the Committee on Local Land Charges, Cmd. 8440, 1952, and the system received their blessing (pp. 8–11). New forms were brought into use on October 1, 1953; and see J. F. Garner in (1953) 17 *Conv.(N.S.)* 349.

A RECONSIDERATION OF *POSSESSIO*

R. W. M. DIAS

THE literature on *possessio* has now assumed such proportions that it will require a volume at least to do anything like justice to it.¹ The purpose of this article is only to outline an approach to the Roman law of *possessio* as suggested by Kocourek's analysis of possession in the common law.² The present writer believes that a substantial similarity exists between these two great systems in their approach to possession and this has not been due to any borrowing by the one from the other: a fact which, if proved, should be of no little jurisprudential interest. It is, therefore, merely as a prologue to a fuller exposition elsewhere that the following contentions are advanced as to *possessio* in Roman law.

Kocourek, writing of the common law, maintained that "possession" as a juridical concept distinct from physical control on the one hand and the right to have physical control on the other was unnecessary. If a person actually holds a thing, he either has a right to continue holding it or he has no right; if he is not holding a thing, he either has or has not a right to hold it. In all cases what matters is the right to have physical control. As long as the term "possession" is confined to physical control, no harm is done, but what Kocourek objects to is that mysterious *tertium quid*, called "possession," from which are distinguished both physical control and the right to it, the former being known variously as "*de facto* possession," "custody," "detention," and the latter as the "right to possess." Kocourek would indeed not deny that lawyers have come to accept such a third concept. He is only setting out an analytical demonstration, the subtleties of which need not concern us here. All we need note is his conclusion, which is, in brief, that there is no consistent theory of possession, that cases are decided on the basis of the right to have physical control, and that the giving of these decisions "is, in the last analysis, simply a question of policy, which unfortunately is heavily obscured by a wholly irrelevant discussion of possession."³

¹ See Windscheid, *Lehrb. des Pandektenrechts*, 9th ed., 1906, i, 732, Bonfante, *Corso di Diritto Romano* (1933), iii, 130, Jörs-Kunkel, *Röm. Recht* (1935), 111.

² *Jural Relations*, 2nd ed., 1928, Chap. 20. I am indebted to Dr. Glanville Williams, who first drew my attention to it. I am also indebted to a course of lectures by Mr. J. W. C. Turner, who reached somewhat similar conclusions by a different line of argument.

³ *Op. cit.*, 389.

When we turn to the Roman law, we find ourselves faced with a varied terminology: "*possessio civilis*," "*possessio*" and "*possessio naturalis*." Riccobono, followed by Buckland, thought that "*possessio*" standing alone meant possession as the basis for the interdicts, "*possessio civilis*" meant possession as the basis for *dominium*, while "*possessio naturalis*" meant custody.⁴ Kunkel objected to this classification and suggested that "*possessio civilis*" meant possession as the basis for *dominium*, but that no distinctions could safely be drawn beyond this.⁵ Hägerström, on the other hand, thought that "*possessio civilis*" covered both civil and interdict possession, while "*possessio naturalis*" meant custody.⁶ The present writer submits that apart from "*possessio naturalis*," which meant custody or physical control, no clear distinctions can be drawn. The term "*possessio*" was used loosely to cover both civil law and interdict possession.

The classic controversy as to the nature of *possessio* is too well known to be reviewed here. Savigny,⁷ basing his theory mainly on the texts of Paul, said that *possessio* consisted of a physical element called "*corpus possessionis*," namely, effective control, and a mental element, which he called "*animus domini*" or "*animus sibi habendi*," the intention to hold as owner. The "*animus domini*" being untenable, his followers altered it to "*animus possidendi*," the intention to exclude other people. The principal objection to all this seems to be that Savigny confuses the conditions generally needed for the acquisition of *possessio* with *possessio* itself.⁸ The other leading protagonist was Ihering, who, after advancing forcible objections to Savigny's theory, propounded the more elastic formula that whenever a person looked like an owner in relation to a thing, he had *possessio* of that thing, unless *possessio* was denied him for reasons based on practical convenience. The mental element was nothing more than awareness of the facts.⁹ Ihering's

⁴ Riccobono, *Z.S.S.* (1910), 321 *et seq.*, Buckland, *Text Book*, 2nd ed., 1932, p. 197. The latter admitted "both looseness in the use of the terms and the probability of interpolation."

⁵ *Symbolae Friburgenses in honorem Ottonis Lenel* (1933), 40 *et seq.*

⁶ *Der röm. Obligationsbegriff* (1927), i. Some doubt may be felt how far Classical lawyers would have used the term "*civilis*" to embrace praetorian remedies, such as the interdicts. Buckland, *ubi sup.*, suggests that interpolation by the compilers sometimes made the Classical jurists appear to have done this.

⁷ *Recht des Besitzes*, trans. Perry (1848).

⁸ Even Paul, on whom Savigny relies so much, does not say that *possessio* "is" *corpus* and *animus*, but only that we acquire it by means of *corpus* and *animus*. Thus, 41.2.3.1: "*apiscimur possessionem corpore et animo*"; *P. Sent.* 5.2.1: "*possessionem adquirimus et animo et corpore*." Also 41.2.8, 50.17.153.

⁹ *Grund des Besitzeschutzes* (1869), *Besitzwille* (1889).

theory seems preferable to that of Savigny for reasons that will be apparent.¹⁰

The best way to approach the whole question of *possessio* is as follows. Physical control was the starting point. It was a fact which ante-dated the law and it exists in the world regardless of the law. When law came into being it took account of this fact of physical control which came to be called technically "*possessio*." In 41.2.1 *pr.* Paul, repeating Labeo, says that *possessio* is derived from *sedes* (possibly *pedis sedibus*), because a thing is held *naturaliter*, i.e., physically, by him who stands on it. It is the latter part of the statement, not the etymology, that is important: the idea of *possessio* is rooted in actual control. To the same effect are the first and last sentences of 41.2.3.5, which say that several persons cannot simultaneously possess the same thing, just as two persons cannot stand or sit in the same spot. (See also 43.26.19 *pr.*) In the developed law the idea of *possessio* became more complex and technical, but these passages, it is submitted, reflect the original idea.

Now, it was this fact of physical control, called "*possessio*," that was originally invested with certain consequences in law. It is convenient at this point to outline these consequences, though needless to say they did not all develop together. In the first place possession in the sense of physical control became *prima facie* evidence of ownership. Secondly, it followed that possession became an important condition for the acquisition of ownership. Thus, (a) it was the first possessor of a *res nullius* who became *dominus*; (b) transfer of possession became increasingly important for the transfer of *dominium*. The early formal methods, *manipatio* and *cessio in jure*, did not require a transfer of possession, perhaps because proof of the transferee's title lay in the publicity of the transactions and in the testimony of the witnesses or the magistrate. When these institutions decayed, transfer of possession remained as the readiest *prima facie* evidence of the transfer of ownership. (c) For the acquisition of title by prescription long continued possession was an important condition. (d) Possession of the *matræ* in good faith was one of the bases for the acquisition of fruits. Thirdly, possession was the basis of the possessory interdicts. Possession may have been protected in this way with the object of protecting ownership (as Ihering maintained), or in the interests of social peace (as Savigny maintained), or very likely for both these reasons.¹¹ Even a wrongful possessor

¹⁰ Lightwood (1887) 3 L.Q.R. 32, and Bond (1890) 6 L.Q.R. 259, are more sympathetic to Ihering than to Savigny.

¹¹ Maitland, P. & M. *History of English Law*, 2nd ed., 1898, ii, 44.

was protected against all the world until someone established a better right to possess: 41.2.53, 43.17.2. In some cases the protection of the interdicts was accorded to persons who were known not to be owners, e.g., *tutor impuberis*, *curator furiosi*, *prodigi*.¹² Fourthly, in the law of pledge possession of the thing pledged was the creditor's security without any presumption of ownership.

As long as possession meant physical control, the position was simple. The difficulty arose owing to the endeavours of the law to keep pace with the increasingly complex demands of everyday situations. It became necessary for various reasons to attribute to persons, who were not actually holding things, some or all the rights, powers and advantages normally attributed to persons who do actually hold things, especially the protection of the interdicts. This seems to have occurred chiefly in cases where a person had been holding a thing and was temporarily parted from it, but the reasons why it was thought fit to attribute to such a person the advantages in law as if he was still holding it differed in different cases. The sphere of legal activity was widening: instead of recognising only the interests of persons presently holding property, it now acknowledged similar interests in persons not actually doing so. At this stage technicality came into play. Tradition had fixed *possessio* as the juridical basis of these advantages. Whereas formerly they had attached to a man because he had physical control (synonymous with *possessio*), now in order to provide similar advantages to a man not in control *possessio* had to be ascribed to him without the need for physical control. It is scarcely surprising that reasoning then began to take the form that whenever a man has these advantages in law, it must be because he has *possessio*.¹³

The obvious consequence of this was to bring about a contrast between actual holding and *possessio* (e.g., 41.2.22, 41.2.49.1, 43.26.6.2), as well as terminological confusion. There was no settled term of art for actual holding, which was at times referred to as "*in possessione esse*" as distinct from "*possidere*." Ulpian in 41.2.10.1 is at pains to explain the difference. (See also G. 4.153, Inst. 4.15.5, 41.2.9 *pr.*) We also find it characterised by "*tenere*" (e.g., 41.2.49 *pr.*, 1), and by coupling *possessio* with such words as "*corporaliter*" (41.2.23.1) and "*naturalis*" and

¹² Doubtful cases: holder of *ager vectigalis* and *precario tenens*. Some texts give the latter *possessio*, though he was only a holder at will and though the borrower for a term had no *possessio*. 41.2.3.5, 41.2.10.1, 41.2.13.7, 43.26.6.2, 43.26.15.4, 43.26.19 *pr.*

¹³ Compare Maitland's summary of early English law. "Legal reasoning seems circular:—for example, it is argued in one case that a man has an action of trespass because he has possession, in the next case that he has possession because he has an action of trespass . . . This play of reasoning between right and remedy fixes the use of words": *op. cit.*, 31.

"*naturaliter*" (e.g., 10.4.3.15, 41.2.1 *pr.*, 41.2.1.1, 41.2.12 *pr.*, Vat. Fr. 258).¹⁴ Instead of all these, the term "*detentio*" is recommended as the best substitute, because it is simpler and less misleading than *possessio*, however qualified.¹⁵ It is to be noted, of course, that all these terms are of later origin than *possessio*, since they were only pressed into service when the idea of *possessio* came to be divorced from the idea of physical control.

Of much greater moment is the effect of all this on the nature of *possessio*. Three situations had become possible. A man could have physical control, yet not have *possessio*; he could have *possessio* without physical control; or he could have both. *Possessio* thus became a pure technicality of the law. Physical control ceased to be the test, and the question why the law attributed *possessio* in some cases and not others became, in the words of Kocourek, "simply a question of policy." It is accordingly submitted that *possessio* developed into a device of legal convenience to effectuate policy differently in different branches. Evidence in support of this contention can be found in many quarters and to this we now turn.

(1) Roman law always paid a great deal of respect to *dominium*.¹⁶ Both Gaius and Justinian tell us that the policy of

¹⁴ See further, Riccobono, *Z.S.S.* (1910), 325. It is fashionable to regard references to "*naturalis*" as interpolated. Even if this is true, it does not affect the present argument.

¹⁵ As one writer wittily remarked in another connection: "If, however, the adjective and noun are to be combined so as to produce a composite noun of an entirely different meaning, this must be carefully explained, or confusion may result; a dog does not cease to be a dog because it may be called a white dog, or a black dog; the expression 'hot dog,' however, is one which would require careful explanation should it become necessary to use it in the course of litigation": Turner, *Modern Approach to Criminal Law* (1945), 208.

¹⁶ This is evident in various ways. Ihering was certainly correct when he said that interdictal protection of *possessio* was with a view to protecting *dominium*. The attitude is also to be detected in the fact that servitudes were not conceived as burdens on *dominium*, but as qualities of the land: 8.6.12 ("*fundus enim qualiter se habens*"), Buckland, *Text Book*, 265, *Main Institutions*, 154; Kagan (1945-1946) 20 *Tulane L.R.* 102-103, (1947) 22 *Tulane L.R.* 101 *et seq.* Hence it is that a servitude could continue to exist over land the *dominium* of which has been abandoned: 8.5.6.2 *fin.* Gaius and Justinian say that usufruct was limited in duration so as not to weaken *dominium* indefinitely: 7.1.3.2, Inst. 2.4.1. The reasons why *dominium* acquired such sanctity are conjectural, but it may originate in an early identification with *patria potestas* as part and parcel of a single concept of sovereignty. It is significant that (a) *mancipatio* and *cessio in iure* were primitive modes of acquiring both *dominium* and *patria potestas*; (b) lapse of an uninterrupted year was a means of acquiring both *dominium* (*usucapio*) and *patria potestas* (*manus*); (c) originally *patria potestas*, like *dominium*, included the power of life and death, sale, pledge; (d) the term "*potestas*" applied to both "*dominica potestas*" and "*patria potestas*," G. 1.52, 55; (e) the words "*dominium*" and "*dominus*" mean "lordship" and "lord," i.e., something more than mere ownership, "*proprietas*." More doubtfully, (f) there is the view that testamentary succession was originally regarded as a devolution of sovereignty rather than ownership; (g) a view held by some is that in its earliest form *dominium*, being sovereignty and hence a personal attribute, was

the law in *usucapio* was not to leave *dominium* in doubt for too long: "*ne rerum dominia diutius in incerto essent*," G. 2.44; "*ne rerum dominia in incerto essent*," Inst. 2.6 *pr.* To complete usucapion, as is well known, possession must be uninterrupted (Reg. Ulp. 19.8). In a different branch of the law, that of pledge, legal policy required that a pledge creditor should have the protection of the interdicts in order that his security might be effective. To have these he must have *possessio*. Suppose the case where a person *in via usucapiendi* pledged the thing. The usucaptor, in order to complete usucapion, must not lose possession, but the pledge creditor must be given possession else his security is worthless. Javolenus in 41.3.16 saw no difficulty: the pledgor was deemed to remain in possession for the purpose of usucapion only ("*qui pignori dedit ad usucapionem tantum possidet*"), while the pledgee was deemed to be in possession for all other purposes ("*quod ad reliquas omnes causas pertinet, qui accepit possidet*"). Paul says the same in 41.2.1.15 ("*ad unam enim tantum causam videri eum—the pledged slave—a debitore possideri, ad usucapionem*"). See also 13.7.29, 41.2.36 and 41.3.33.4, 6.¹⁷ Where the debtor was not usucaping, only the creditor had possession: 13.7.35.1, 13.7.37, 41.2.37.

(2) The flexibility of *possessio* is also to be seen in the fact that for certain purposes it was necessary to regard a man who had only a right to possess as if he was actually in possession: 41.2.17 *pr.* (See also 50.16.143 and 50.17.15, though they do not refer specifically to *possessio*.)

(3) The law, as Ihering maintained, did protect possession, at any rate on some occasions, with a view to protecting *dominium*. In order to do this possession was artificially extended. 41.2.3.15–16 tell us that possession was retained over certain types of wild creatures, although they strayed, as long as they had the *animus revertendi*. 41.2.3.11 shows that possession was retained over summer and winter pastures, even while their owners were absent. This was, no doubt, the usual case, but the rule was not limited to it: 43.16.1.25. (See also 41.2.3.7, 41.2.27, 41.2.44.2.)

not transferable; (h) it has also been suggested ingeniously that the word "*liber*," meaning both "child" and "free," dates from a time when the whole *familia* was under one sovereignty, but the children were the "free" members (*liberi*) as distinct from the unfree members.

¹⁷ Sabinus and Trebatius applied similar reasoning to *precarius* in 41.2.3.5, while Labeo and Paul did not; nor did Ulpian in 41.2.13.7, nor Julian in 43.26.19 *pr.* Pomponius remarks on the dispute in 43.26.15.4. 41.2.43.1 says that a *bona fide possessor* is not prevented by the existence of an usufruct from usucaping. This is not an example of *possessio* being vested in two persons for different purposes, but at most *possessio* of different things. The *bona fide possessor* possessed the object, while the fructuary, as we shall see, possessed the right, but more usually he was only treated "as if in possession."

(4) *Possessio* of a thing for the purpose of usucapion or the interdicts was not necessarily *possessio* of it for the purpose of acquiring through it. That *possessio* had at one time been a basis for acquiring through a thing is implicit in the doubts expressed as to how far there could be acquisition through persons and things that were not possessed. (See G. 2.86, 90, 94–95, Inst. 2.9 *pr.*) It was eventually settled that there could be acquisition in some cases even through things and persons not in possession, such as things in usufruct and procurators. More important, however, is that legal policy denied possession for the purpose of acquisition to one who was deemed in possession for some other purpose. Thus, we have seen that a person who gave a thing in pledge remained in possession for the purpose of usucapion only; he was not in possession for the purpose of acquisition or any other: 41.2.1.15, 41.3.16. On the other hand, the pledge creditor, although said to be in possession for all other purposes (“*ad reliquas omnes causas*”: 41.3.16), was arbitrarily forbidden by the law to acquire through the thing pledged, since he was not allowed to make a profit out of it: 41.1.37 *pr.*, 41.2.1.15. Possibly another case is that of the fugitive slave. Continued possession by the master of such a slave was grounded in convenience: “*utilitatis causa receptum*,” 41.2.1.14.¹⁸ 47.2.17.3 says that such possession was only for the purpose of usucapion, and this may be the reason why at the end of 41.1.54 Modestinus denied acquisition through a fugitive on the ground that he was not possessed, that is, presumably, not possessed for this purpose. However, acquisition through such a slave was allowed after dispute. Pomponius denied it in 6.2.15 and so did the younger Nerva in 41.2.1.14. Cassius and Julian are quoted in 41.2.1.14 as having allowed it and so did Gaius (40.12.25.2) and Hermogenian (41.2.50.1).

(5) A depositee had no *possessio*, only *detentio*. With this must be compared *sequestratio*, which was only deposit pending the settlement of a dispute: 50.16.110. Normally, here also possession remained with the depositor. It could happen, however, that one party to the dispute was usucaping and the whole object of the deposit was to halt the usucapion by interrupting his possession. For this purpose *possessio* was made to vest in the sequester-deposittee: 16.3.17.1, 41.2.39. This shows that within the contract of deposit itself the incidence of *possessio* could vary according to the policy of the law. The reason why the deposittee was normally denied *possessio* may be, perhaps, that the interest lay with the

¹⁸ Other reasons are also given: Buckland, *Slavery* (1908), 269. See generally, 7.1.12.3, 41.2.3.10, 41.2.13 *pr.*, 41.2.15, 41.2.47, 41.3.15.1, 44.3.8, P. Sent. 2.31.37 and 4.14.3.

depositor, for the deposittee was forbidden to use the thing. It was the party with the interest who needed the protection of the interdicts and so *possessio* was deemed to remain with him. This argument would not apply to the borrower or hirer, both of whom had a definite interest in the thing, and yet were denied *possessio*. It may well be that different reasons applied in different cases. The fact remains, however, that in all these cases holders of property were arbitrarily denied *possessio*, whatever the reason may have been.

(6) *Traditio brevi manu*, *constitutum possessorium* and *traditio longa manu* were devices whereby *possessio* could be shifted about without inconvenience. They are too well known to require elaboration. (Note the discussion in 41.2.51.)

(7) If a person *in via usucapiendi* died, his heir could continue the *possessio* for the purpose of completing usucapion: 4.6.30 *pr.* (41.2.30.5 *fin.*, 41.3.31.5, 41.3.44.3 and 41.4.6.2 only say that the heir could continue to usucape, the continuance of possession being implied.) This can only be a continuation of the old possession for a variety of reasons. (a) Usucapion required continuity in possession (Reg. Ulp. 19.8) and for the heir to continue usucapion it must be the old possession that was continuing. Moreover, 4.6.30 *pr.* is explicit: it says that the possession of the deceased descends to the heir as it were joined to the inheritance, "*possessio defuncti quasi injuncta descendit ad heredem.*" (b) Good faith was required at the commencement of the possession. Provided his predecessor had begun in good faith, the heir's own good faith was immaterial, *i.e.*, he was only continuing a possession which had begun in good faith: 41.4.2.19.¹⁹ (c) If anyone else possessed between death and the heir's entry, this amounted to an interruption in possession, *usurpatio*, a rule which can only have any meaning if we assume that the old possession was going on: 41.3.20, 41.4.6.2 *fin.* (d) Even before the heir's entry, the vacant inheritance could complete usucapion: 4.6.30 *pr.*, *fin.*, 41.3.40, 41.4.6.2. For purposes other than usucapion, however, the heir's possession was a new one reckoned from the moment he actually took the thing: 41.2.23 *pr.*, 41.2.30.5.²⁰

(8) It has been submitted above that *corpus* and *animus* were not ingredients of *possessio*, but conditions under which it was acquired and lost. Generally, the acquirer had to supply the

¹⁹ Contrast the rule of *accessio possessionum*: where a person *in via usucapiendi* sold the thing, the purchaser could add on the seller's *possessio* to his own, but his is a new *possessio* and he also must begin in good faith: 41.4.2.17.

²⁰ In *utrubi* Gaius allowed the heir to add on his predecessor's possession to his own, but only when he took possession himself: G. 4.151; and this is supported by 41.2.13.12 and 44.3.16, both of which are thought to have been written of *utrubi*. In 41.2.13.4 there is a suggestion, which is rejected, that the heir should avail himself of his predecessor's possession even without possession in himself. See De Zulueta, *Ad* 41.1 & 41.2.

element of effective control, "*corpus*," and an awareness of what was happening, "*animus*." The awareness had to be in him personally, but the control could be supplied either by him or by an efficient instrument: "*animo utique nostro, corpore vel nostro vel alieno*," P. Sent. 5.2.1. The instrument could be an inanimate thing, (41.2.1.21, 41.2.18.2), or a human being (6.1.77, 41.2.18 *pr.*, 41.2.19 *pr.*—1, 41.2.21.3, 41.2.42.1).¹ For reasons of convenience the law did on occasions dispense with the *animus* element. Thus, where the acquisition was through a *filius* or a slave in connection with the *peculium*, possession vested in the superior without *animus* in him, and thus it was that insane and infant masters and inheritances could acquire through the *peculium* of slaves. Papinian in 41.2.44.1 based this relaxation of the normal rule on convenience: "*dixi utilitatis causa jure singulari receptum*." (See 41.2.1.5, 41.2.3.12, 41.2.4, 41.2.24, possibly 41.2.34.2, where reference to *peculium* may be implied, and inferentially 41.1.54.4. Acquisition for insane and infant masters and inheritances: 6.2.9.6, 41.2.1.5, 41.2.32.2 *fin.*, 44.7.16). Indeed, the father or master was even allowed to usucap without knowledge a thing acquired for the *peculium*. (See 41.3.8 *pr.*, 41.3.31.3, 41.3.44.7, 41.3.47). It followed, therefore, that when the acquisition was not in connection with the *peculium*, the normal principle applied and *animus* was needed: 41.2.44.1. Even here, however, Pomponius allowed an insane or infant master to start usucaping without knowledge, very likely for convenience: 41.3.28.

Another instance of *animus* being dispensed with was where a principal acquired possession for the purposes of the interdicts through a *procurator*, provided the latter had been given a prior mandate: 41.2.42.1. Paul says this rule was adopted on grounds of convenience: "*sed per procuratorem adquiri nobis possessionem posse utilitatis causa receptum est*," P. Sent. 5.2.2. The operation of legal policy can be seen in the further rule that on the same facts, although the principal acquired possession, he could not begin to usucap until he got to know. The texts do not actually say that the principal did not get possession for the purpose of usucapion, but it looks as if this was the case. C. 7.32.1 states both rules and adds that the position had long been settled as much on grounds of convenience as of law: "*tam ratione utilitatis quam juris*

¹ Where the instrument was inanimate, it is submitted that the criterion of "efficiency" was the probability of non-interference by others, which varies with the circumstances. Where the instrument was a human being, his state of mind only showed whether he was an efficient instrument for his principal or not. See Buckland, R. H. (1925), 355, Bull. Acad. royale de Belgique (1939), xxv, 188, Schultz, *Einführung* (1916), 63, *Classical Law* (1951), 435, Mitteis, *R.Pr.* (1908), 211.

pridem receptum est." The distinction is also stated in 41.2.49.2 and 41.3.47; (13.7.11.6 does not mention the usucapion rule). The reason for it is probably that usucapion affected *dominium* and had more serious and lasting consequences than the interdicts, which were essentially provisional; to have had the same rule in usucapion as in the interdicts would have been dangerous. There was also a sharp distinction between the usucapion rule here and in relation to the *peculium*, which can only be accounted for by the special position enjoyed by the *peculium* in the eyes of the law.²

(9) If, as Savigny maintained, *possessio* "was" both *corpus* and *animus*, then it would have been lost when one or the other was lost. When, therefore, Paul said in 41.2.8 and 50.17.153 that both *corpus* and *animus* have to be lost, Savigny was forced to amend "*utrumque*" into "*alterutrum*," one or the other.³ That only forced him into a worse artificiality. He could not escape the fact that in a good many texts a man retained possession without both elements being present. He accordingly maintained that for the continuation of possession, as distinct from its acquisition, it was not necessary that both should continue to be present, provided they could both be reproduced at will.⁴ The proviso was essential to his thesis that possession "was" both *corpus* and *animus*, since the permanent loss of either would have meant loss of possession. Even with this qualification, his proposition is untenable as the examples to be quoted show. It is perfectly true that less facts were required to preserve possession than to acquire it, but this only shows that the conditions needed to acquire, retain or lose possession were all governed by legal policy and convenience. No one loses possession by losing *animus*, whether temporarily, e.g., by falling asleep, or permanently, e.g., by going mad. 41.3.44.6 shows that possession had to continue, notwithstanding supervening insanity, in order to continue usucapion and Papinian gives convenience as the reason: "*utilitate suadente.*" 41.2.30.5 says generally that one may lose *corpus* and retain possession *animo solo*. We also lose the *corpus* element when a slave runs away, yet we remain in possession "*utilitatis causa*": 41.2.1.14. 41.2.44 *pr.* is another case of loss of *corpus*, possibly permanent, so too is 41.3.31.3, where the agent through whom the thing was held went mad, i.e., he ceased being an efficient instrument. Convenience is also the basis of the retention of possession through a tenant farmer

² There was a rule, attributed to the *Lex Atinia*, that if a stolen thing returned to the "*potestas*" of the *dominus*, someone else could usucap it. 41.3.41 says that although recovery by a *procurator* vested possession in the *dominus*, this was not return to his *potestas* within the meaning of the usucapion rule; to hold otherwise would be "*captiosum*."

³ *Op. cit.*, 247.

⁴ *Op. cit.*, 253, 266.

according to 41.2.40.1: "*propter utilitatem receptum est*," while in the same text Julian seems prepared to continue possession, presumably for convenience, even if the tenant died. 41.2.3.11 shows that a man retained possession of summer and winter pastures *animo solo*. If he then went mad, he would have lost both *corpus* and *animus*, yet he remained in possession: 41.2.27.

(10) The so-called "*quasi possessio*" and "*possessio juris*" of usufruct and servitudes have presented many difficulties. The holder of a servitude, e.g., a right of way, obviously did not possess the whole land over a part of which he exercised his right, nor did the usufructuary even though his right extended over the whole. On this Gaius is explicit: G. 2.93. (See also 8.2.32.1, 41.2.1.8, 41.2.12 *pr.*, 41.2.49 *pr.*, 41.2.52 *pr.*, 41.3.4.26, 43.3.1.8, 43.26.6.2, Vat. Fr. 90.) The reason may have lain in the policy of the law to preserve to the *dominus* at least the advantages of possession, since his title was already so denuded of practical content by the usufruct. Nevertheless, to both servitude and usufruct the idea of possession was applied in rather a curious way, and it is this that is spoken of as "*quasi possessio*" and "*possessio juris*." Now, "*quasi possessio*" of the thing does not mean quite the same as "*possessio* of the *jus*" over it, although they both refer to the same situation; similarly, to say that a man looks as if he is in possession of a thing, "*quasi in possessione*," is not the same as saying that he has "*quasi possessio*" of it. All these expressions are found in the texts. 43.16.3.17 has "*fuit quasi in possessione*," while "*quasi possessio*" is to be found in G. 4.139, Inst. 4.15 *pr.*, 4.6.23.2, 8.5.10 *pr.*; and "*possessio juris*" occurs in 5.3.18.1, 8.1.20 (where the context suggests it), 8.4.2, 8.5.6.1, 43.17.4, 43.19.7, 43.26.2.3.⁵

It seems that what constituted *quasi possessio* or *possessio juris* was actual exercise of the right. We are told in 8.1.20 that there can be no delivery of a right of way, but the exercise of the right must be taken as delivery of possession: "*nulla ejusmodi juris vacua traditio esset. ego puto usum ejus juris pro traditione possessionis accipiendum esse*." (See also 8.5.2.3, 8.5.10 *pr.*, 8.6.20.) The question is, why was "*possessio*" of all terms selected to connote this?⁶ The answer once more, it is submitted, lies in

⁵ It is held that *quasi possessio* and *possessio juris* are terms of late origin and that "*aut quasi possessione*" in G. 4.139 is a gloss. Albertario, Bull. dell' Istituto di Diritto Romano (1912), I, (1914), 275. If this contention is correct, it would only reinforce the present argument.

⁶ The question of the relationship between servitudes and usufruct is not germane to the present point, nor the question of their nature, especially that of usufruct. In both cases the holders of the rights had access to the objects over which the rights were exercised. We are here concerned with the question why such access was called "*possessio*."

legal policy and the interplay between remedy and terminology, previously mentioned. The holders of these rights looked as if they were in possession and the necessity was felt of affording them protection, especially of the interdicts. Historically these remedies had come to be based on *possessio*, but legal policy had decreed that these persons were not to have *possessio*, however much they looked as if they did. The remedies were accordingly given in an *utilis* form, which is made quite clear in Vat. Fr. 90. The praetor gave a remedy whenever the situation so demanded without overmuch regard for theory. In 43.16.3.13 we are told that the necessity of giving the fructuary the interdict *unde vi* had become apparent and 3.17 proceeds to say that no matter how he came to be in a position, which made him look as if he was in possession, he has the interdict. The attempt at rationalisation came with the jurists. When such remedies were found to have been given, the inference seems to have been drawn *a posteriori* that it must be because these persons had some sort of *possessio*. The law having denied them *possessio* of the things themselves, the uncouth compromise was to say that they had a "sort of *possessio*" of the things, or *possessio* of the right and not of the things. An example of such reasoning is in 8.1.20, where it is said that to allow the exercise of a right of way is equivalent to a delivery of possession and for this reason ("*ideoque*") interdicts corresponding to the possessory ones have been devised. (See also 39.5.27.)⁷

The foregoing considerations appear to establish beyond doubt that *possessio* was based, not on any fixed principle, but on policy and convenience. Let us in conclusion glance at the somewhat unreal question whether *possessio* was a matter of law or fact.⁸ The opposing considerations may be adumbrated as follows. (a) As long as *possessio* meant no more than physical control, it was a fact. When the two ideas became separate, *possessio* tended to become a matter of law. Whether *possessio* was to be attributed to a person not actually holding the thing, or denied to one who did hold it, could only be ascertained by knowing the law. (b) *Possessio*, we are told, applied only to physical objects, which supports the conception of it as a matter of fact: 41.1.43.1, 41.2.3 *pr.* Nor does the idea of *quasi possessio* militate against this. The extension of *possessio* to rights, however, makes it at

⁷ It is not necessary to consider whether the term *quasi possessio* or *possessio juris* came first. They were applied to an increasingly large number of rights. Arangio-Ruiz, *Istituzioni di Diritto Romano*, 9th ed., 279.

⁸ I am indebted to Professor P. W. Duff and Dr. Glanville Williams for suggestions and criticisms, especially on this part of the article, and I am grateful also to Professor Daube for reading the original draft. It must not be assumed that they necessarily agree with everything set out here.

once a matter of law, for it becomes a pure technicality to enable the bringing of certain remedies. (c) The doctrine of *postliminium* revived the legal position of a returning prisoner of war automatically, but not his *possessio*: 41.2.23.1. This suggests that *possessio* was not a matter of law, but of fact. (d) Gifts between spouses were void in law. 41.2.1.4 says that where a husband yielded possession to his wife by way of gift, she got possession, because it was not a matter of law. Ulpian in 24.1.46, however, denies that there could be a gift even of possession, and it looks as if he was treating it as a matter of law. 5.3.13.1 and 41.2.16 say that the wife possesses "*pro possessore*," which implies that she did not get *possessio*. (e) As a matter of law a *filius* or slave could improve the legal position of his superior automatically, whether the latter knew or not. The special case of *peculium* apart, there could be no acquisition of *possessio* without knowledge: 41.2.44.1. This might suggest that *possessio* was not a matter of law. (f) Texts, such as 41.2.3.5, which say that two persons cannot both possess at the same time, suggest that possession was a matter of fact. Texts, such as 41.3.16, which say that one person could possess for a certain purpose in law while another could simultaneously possess for a different purpose, suggest that it was a matter of law. (g) The jurists themselves differed, which is not to be wondered at. Paul says it was a matter of fact, 41.2.1.3-4; so does Marcian, 41.1.11. Papinian says it was both a matter of fact and of law, 41.2.49.1. Paul and Labeo in 41.2.3.5, Javolenus in 41.2.23.1, Julian in 43.26.19 *pr.* imply it was fact. Sabinus and Trebatius in 41.2.3.5, Ulpian in 24.1.46 and 43.17.3 *pr.*, and Pomponius in 43.26.15.4 imply it was law.

The explanation may be that *possessio* has three aspects, which are not always distinguished. In the first place, the relation between a person and a thing is a matter of fact. Secondly, the advantages which the law attaches to that relationship are matters of law. Thirdly, these advantages are attributed to a person when certain facts are present. It is a matter of law what facts are needed in particular cases. Usually there has to be physical control coupled with awareness but as we have seen one or other or both may be dispensed with, while in all cases of *detentio* a person may have both these and yet be denied *possessio*. A thief from a *detentor*, on the other hand, does get *possessio*, because the reasons which deprive the *detentor* of *possessio* do not apply to him. Just as the whole question of the incidence of possession was governed by policy and convenience, it seems that the jurists answered the question whether possession was a matter of law or fact also according to the need of the moment.

BOOK REVIEWS

The Rule Against Perpetuities. By J. H. C. MORRIS, D.C.L., of Gray's Inn, Barrister-at-Law; Fellow of Magdalen College, Oxford, and W. BARTON LEACH, LL.B., of the Massachusetts Bar; Story Professor of Law, Harvard Law School. [London: Stevens & Sons, Ltd. 1956. xlvii and 327 and (index) 9 pp. £2 15s. net.]

THE Rule against Perpetuities is hardly to everyone's taste and its intricacies tend to cause despondency amongst students. Professor Leach's articles, however, have long shown that to him at least the Rule provides a source of entertainment, as well as an opportunity for logical reasoning and analysis. His pungent criticisms of the Rule's absurdities in relation to "fertile octogenarians," "precocious toddlers," "unborn widows," "unappointed lieutenant-colonels" and "magic gravel pits" must have evoked a surprised chuckle of amusement from many hesitant readers. Nor is Dr. Morris a newcomer to the Rule; in particular it is thanks to his article on the rule in *Andrews v. Partington* that the class-closing rules have at last found their way into the students' textbooks. This new North-Atlantic alliance between two such authorities has produced a quite remarkable result.

The book is intended for lawyers who are not specialists in this field and for students already basically familiar with the law of future interests. The emphasis is not on logic or history, but on the functioning of the Rule in its modern social environment. About half of the present volume is based on Professor Leach's exposition of the Rule in Part 24 of *American Law of Property*; the other half is based either on the authors' numerous articles or on new material written by Dr. Morris, who modestly understates his contribution in welding this considerable mass of previously published material into so effective a unity and in furnishing the citations of authority. These latter are quite unusually comprehensive, including as they do all relevant English, Irish and British Commonwealth decisions, together with a careful selection of American cases likely to be instructive to English readers. Their analysis and classification must have entailed enormous labour. Further, constant references are made to selected American and Commonwealth legislation on perpetuities and accumulations, which, together with the relevant sections of the Law of Property Act, 1925, are set out in the two Appendices. The lay-out is attractive and helpful, the printing good and only one misprint has been noticed.

Throughout the book extremely lucid statements of the law applicable to the various aspects of the Rule, copiously illustrated by instructive examples, are followed by critical, indeed often by caustic, commentaries thereon. The passages referred to under the title "critique" in the excellent index reveal the gruelling test of utility to which the learned authors have subjected the Rule. For each weakness displayed they suggest possible reforms, based either on their own conclusions or on both transatlantic and Australasian experience. In these passages of critique lies the real heart of the book.

After a brief history of the Rule since the seventeenth century, some real justification is sought for its continued existence in the vastly changed conditions of today (pp. 15-18). Income-tax, surtax and death duties now suffice to prevent undue accumulations of wealth in a few hands. The Rule is an inefficient instrument for preventing capricious or eccentric dispositions, often striking down the innocent limitation which infringes its rigid letter whilst letting through the skilfully drafted limitation which blatantly infringes its spirit. The dangers of any particular property being withdrawn from commerce, or of the dead hand of the settlor ruling from the grave, have been largely eliminated by the provisions of the Settled Land Act, 1925, the increasing use of unrestricted investment clauses and the modern preference for the discretionary trust in order to mitigate the effects of taxing statutes. It is concluded that the best justification for the Rule today is Professor Simes' suggestion that it helps to attain a compromise between the conflicting desires of the present and of succeeding generations for freedom to dispose of the property which they enjoy, and that on the whole it does more good than harm (p. 18). Is there any other rule of law with so wide and drastic an operation for which some clear justification is so hard to find? Yet the abolitionist must heed Professor Simes' warning that "The path of American legal history is strewn with the remains of unsuccessful substitutes for the rule against perpetuities."

Of the many possible reforms suggested, three would have a general application. First, a *cy-près* jurisdiction so to mould invalid limitations as to bring them within permissible limits would probably render other statutory changes unnecessary (p. 34). The authors do not anticipate undue difficulty in the exercise of such a jurisdiction, but appreciate that it might prove unpopular with English judges, and, for that reason, impracticable. Secondly, the case is irresistible for the adoption of the "wait and see" principle, whereby actualities rather than mere possibilities would be considered in applying the Rule (pp. 83-89). Successful legislation in Pennsylvania and Massachusetts shows the way. Since the specified contingency in practice usually occurs well within the period, this change would of itself humanise the Rule whilst

preserving its usefulness where a real danger of remote vesting actually occurs. English courts were long familiar with such a principle in the case of legal contingent remainders, and even today it is still applied in exceptional cases, as in testing the validity of an appointment under a special power. Thirdly, in all cases of constructional ambiguity, gifts should be so construed as to validate them within the Rule where possible (p. 247).

Many more detailed amendments are considered. The present perpetuity period is itself challenged (pp. 66-68). Since settlors habitually regard the distribution of capital to beneficiaries under a family settlement at the age of twenty-one as being premature, should not the period in such cases be increased to lives in being and twenty-five, or even thirty, years thereafter? Lives in being, however, are irrelevant to options and other commercial interests. A period of years in gross should be substituted in such cases, differing in length to suit each type of transaction, which should be void only as to any excess beyond the relevant period. This seems eminently sensible, although possible difficulties in differentiating various types of transaction might make a uniform period of years preferable for all such transactions. "Fertile octogenarians" and "precocious toddlers" should be recognised as the rare freaks which they are by the enactment of rebuttable presumptions that women over, say, fifty-two and persons under fourteen are incapable of having children; further, evidence should be admissible that a person of any age is similarly incapable on surgical or physiological grounds (p. 81).

The "All or Nothing" rule, whereby a gift to a class of persons wholly fails unless every member of the class is certain to be ascertained, if at all, within the period, is castigated as practically and analytically unsound (p. 118). Such gifts should vest in those members of the class who comply with the Rule to the exclusion of those who do not. On this matter (p. 125), however, and on the analogous American doctrine of "Infectious Invalidity," whereby a subsequent invalid limitation may cause the court to invalidate a prior limitation, valid in itself, if it considers that the settlor's real intention would be better effected by a total rather than a partial failure (p. 163), the authors disagree. But in the converse situation they agree that the rule that a subsequent limitation will fail if it is "dependent or expectant" on a prior invalid limitation is unsatisfactory. A distinction is urged between subsequent limitations which are intrinsically remote because they depend upon the *same* contingency as the prior interest, and those which are intrinsically valid because they are either vested or bound to vest (if at all) within the period (pp. 165-174).

Possibilities of reverter after determinable fees (p. 207), and resulting trusts of personalty analogous to them (p. 206), should be subject to the Rule, since their mischief is similar to that of

conditional fees, to which the Rule undoubtedly applies in England. A practical solution is suggested by section 3 of the Massachusetts Perpetuities Act, 1954, whereby a determinable or conditional fee becomes absolute if the specified contingency does not occur within thirty years from the cesser of all prior interests (if any), unless it was bound to occur (if at all) during the perpetuity period, in which case the interests take effect as limited. The contrary solution is proposed for commercial interests. Rights of re-entry upon land subject to a perpetual rentcharge should be exempted from the Rule, and the ambiguities of the Law of Property Act, 1925, on this point resolved (pp. 211-212). The present curious tangle in respect of options to purchase land should be excised by exempting options of all kinds from the Rule (p. 220). Options to purchase reversions on leases are not objectionable, since the lessees' power to enfranchise may stimulate improvements to the land. By contrast, the self-interest of the parties can be relied on to ensure that options not contained in leases do not fetter the development of land. The State of New York has not, apparently, found such complete freedom inconvenient, although some might prefer a maximum permissible period of years in such cases, with invalidity only as to any excess beyond the period. The administrative powers of trustees to sell, lease, exchange, etc., should also be specifically exempted provided that they are ancillary to the execution of a trust of which the beneficial interests are themselves valid, as has been provided by section 3 of the Trustee (Amendment) Act, 1929, in New South Wales (p. 232).

Since work on this volume commenced, the subject of perpetuities has been referred to the Law Reform Committee for consideration. The availability of the author's stimulating proposals, collected in book form, at such a time is therefore a very happy coincidence and they must have proved invaluable to the Committee. It would be surprising, to say the least, if a number of the reforms here suggested are not eventually echoed in the Committee's report, and one hopes that the authors may reap their just reward by seeing substantial amendments of the Rule carried through in the not too distant future. If this should happen, they propose to renew their labours and issue a supplement explaining and commenting upon the statutory provisions.

J. W. A. THORNELY.

The Law of Torts. By HARRY STREET, LL.M., PH.D., Solicitor, Professor of Law in the University of Nottingham. [London: Butterworth & Co. (Publishers), Ltd. 1955. lxxxiii, 511 and (index) 43 pp. 45s. net.]

HERE, for the first time in England, we have a major textbook of the law of tort which is arranged in the right teaching order. The

ideal sequence of subjects in a textbook is not necessarily the same as in a code. Both Salmond and Winfield (and Pollock) are written backwards from the teaching point of view. They are arranged on the supposition that the general part of the law of tort is best expounded before the special part. This means that the student learns about voluntary assumption of risk before being instructed in the tort of negligence to which it is a defence, and remoteness of damage before the essentials of liability. The special rules of status appear before the student has any knowledge of the torts that these special rules modify. The topic of death in relation to tort is treated before the subject of live plaintiffs has been properly disposed of. The difficult problem of the foundation of liability in tort is put first instead of last, and *Mayor of Bradford v. Pickles* is discussed in isolation from the tort of nuisance.

American law schools, using the case method of instruction, have long since discovered that if the student is to be taught to read a case, he must be given almost at the beginning a collection of cases on some particular department of law, such as assault or homicide. Discussion of general principles has to grow out of the concrete law, and the full academic discussion of these principles must be placed last in the course. In the law of tort, the ideal beginning is with the tort of assault and the other torts of intentional interference with the person. They are historically and socially the basic part of the law of tort; they present dramatic situations, and they are relatively simple because they do not introduce the refinements of negligence. Professor Street adopts this plan and reaches battery on page 16 of his book, after the very barest general introduction. The title "Remedies and Parties" falls in its proper place at the end of the book.

This is admirable, and so is the detailed arrangement of the work, showing under each tort what the plaintiff has to prove and what are the defences. The way in which the law is treated is generally both bold and rational: there are sound judgments, for example, on such muddled topics in the law as dangerous things, casual delegation, and liability for "agents." When Professor Street stops to pick a dispute with one of his fellow writers, which he often does, he nearly always has the better of it. But he makes quite a number of statements of his own that might be challenged with equal success by another writer. In a work of this magnitude some slips and obscurities are inevitable, and will doubtless disappear in later editions.

Street, then, is a new teaching and research tool of considerable importance in the law of tort. Yet, pretty clearly, the aim of the author and publishers will not be satisfied merely by saying that this is a book to go on the shelves of the law library. The book makes a bid for the coveted prize of being Recommended Reading for University students. Since most law students concentrate

upon a single textbook, this issue, which every tort teacher will have to decide for himself, is whether in future the recommendation is going to be Street instead of Salmond or Winfield.

Looked at from this point of view, there are some matters on the debit side. It must sorrowfully be said that what Street gains on legal arrangement and on the exhibition, very often, of legal acumen, he loses on the intangible qualities of style. Reading Winfield or Salmond can be said without too much exaggeration to be a pleasure; but Street, in giving tort the logical form of the law of real property, has invested it with something of the dryness of that discipline. There is, also, the matter of detail. The ideal for a beginner's book in a case subject is that it should use as few cases as possible, but those cases, which the student should generally be expected to read, should be dissected with the utmost care. It is not necessary for the writer to support with an authority every trivial affirmation; this overloads the footnotes and is the job of the practitioner's treatise. Similarly, too much detailed illustration of general principles is to be avoided. It is an illusory aim even to try to state the abstract law fully. There is far too much detail in the law of tort for full statement in a textbook; the student has not the time for it, and he will not remember it. In short, the ideal University textbook should concentrate on the more important principles; it should distil the maximum law from the minimum authority; and it should tell the reader in what other books he can find the details. It is somewhat remarkable that, when every lecturer's notes are in this form, no one seems to be able to write a really satisfactory book in the same way. And with successive editions the position generally grows worse, because new cases are put in without the old being taken out. Even in its first edition Street is rather far from the ideal; in its effort to be comprehensive, the fundamental principles and leading cases do not stand out in sufficient relief. Both Salmond and Winfield, notwithstanding the accretions of references that they have gained with age, give a better impression of the landscape.

In his reaction from what he probably considers the excessively academic character of existing textbooks, Professor Street has rather severely stripped his book of any passages that could be suspected of being historical or jurisprudential. The opening discussion of the forms of action is hardly adequate to acquaint the student of the historical reason for the present divisions of the law, and there are some curiously muddled remarks on the relation of trespass and negligence, the requirement of an "act" in negligence, and the concept of voluntary conduct. Particularly disappointing in a modern work on tort is the absence of any serious discussion of the rationale of strict and vicarious liability and the justification of the law of tort. It is no use saying that these topics belong to jurisprudence and not to tort, because that only means that most

students will never hear of them. In any University course on the law of tort they should be regarded as the most important part of the subject, and not mere addenda.

GLANVILLE WILLIAMS.

The Law of Contract. Fourth Edition. By G. C. CHESHIRE, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, Reader in the Law of Real Property to the Council of Legal Education, and C. H. S. FIFOOT, M.A., F.B.A., of the Middle Temple, Barrister-at-Law, Fellow of Hertford College, Oxford, All Souls Reader in English Law, Reader in Common Law to the Council of Legal Education. [London: Butterworth & Co. (Publishers), Ltd. 1956. lxxvii and 556 and (index) 36 pp. 47s. 6d. net.]

DURING the eleven years since its first appearance Cheshire and Fifoot has been the most widely read, frequently quoted and vigorously discussed of all textbooks on the law of contract. A new edition immediately excites interest and the announcement in the preface to this edition that the "experienced reader will observe, with irritation or amusement, that the chapter on Mistake has been redrafted" sends one eagerly to the text on that subject. The familiar classification into common, mutual and unilateral mistake is retained, but the material on mistake is now dealt with in two main categories: first, cases where agreement has been reached, but on the basis of common mistake; secondly, cases where an apparent agreement is alleged to be vitiated by mutual or unilateral mistake. This arrangement is an improvement on earlier ones and will, as the authors hope, "bring some relief to the apprehensive student." To the reviewer there is, however, one irritant. On p. 181 the authors quote a passage from the judgment of Mr. Justice Pilcher in *Harrison and Jones, Ltd. v. Bunten and Lancaster, Ltd.* [1953] 1 Q.B. 646. In it the phrase "mutual mistake" occurs once. In a footnote to this the authors claim that "the word 'mutual' is clearly a slip *per incuriam* for 'common'." The full judgment shows quite clearly that it is not. It is used nine times, admittedly in contexts in which Cheshire and Fifoot would have used "common." The usage may be old-fashioned but it is not a slip because Mr. Justice Pilcher never meant to say anything else. It is surely important that beginners should be made to realise that, despite the rebuke on p. 173, judges and counsel are still not bound either by the authors' labels or by the O.E.D., and that the words "mutual" and "unilateral" may, in argument and judgments, bear meanings quite different from those attributed to them by Cheshire and Fifoot.

One finds throughout the book the cases, decided since the last edition, that one would expect to find: *Pharmaceutical Society v.*

Boots Cash Chemists on offer; the *Telex* case on acceptance; the *Tool Metal* case on the *High Trees* doctrine; *Simpkins v. Pays* on intention to create legal obligations; *Woolmer v. Delmer Price* and *Adler v. Dickson* in a revised passage on exemption clauses (pp. 108–114) which is particularly valuable; *Wilson v. Rickett, Cockerell* on implied conditions of merchantable quality; *Harrison and Jones v. Bunten and Lancaster* (Calcutta kapok), *Rose v. Pim* (horsebeans) and *McRae v. Commonwealth Disposals* (the non-existent tanker) on mistake; *Marles v. Philip Trant* on the consequences of illegality; *Goodinson v. Goodinson* on severance. These, and many others, are incorporated admirably into the text. *Strongman v. Sincock* [1955] 2 Q.B. 525—an interesting case in which the Court of Appeal allowed a builder to recover, as damages for breach of a collateral contract that there would be no illegality, the balance of his bill which was for work illegally done—seems to be an absentee, and *McRae*, which somewhat surprisingly meets with the authors' disapproval, perhaps deserves more than a lengthy footnote.

There has been a substantial amount of rewriting. The Report of the Law Revision Committee on Consideration has been reassessed in greater detail. The chapter on the Statute of Frauds has necessarily been recast and reduced. The revised chapter on Privity is as good as the subject permits it to be and one is relieved to know, from the Preface, that section 56 of Law of Property Act, 1925, and *Drive Yourself Hire Co. v. Strutt* have not yet ruptured the harmonious relationship. There is an interesting expansion of the discussion of frustration in its application to leases and agreements for leases (pp. 470–474). There has been some verbal modification, and perhaps a softening, of the passage on *British Movietonews* (p. 462) which had proved unacceptable to some reviewers of the third edition. It is still not wholly acceptable to this reviewer, but it is consoling to think that in the next edition the authors will be much more concerned with the recent remarks of the House of Lords in *Davis Contractors v. Fareham U.D.C.* [1956] 3 W.L.R. 37; 2 All E.R. 145, than with those in the *Movietonews* case which they dismissed as *obiter dicta*. The statement, on p. 478, of the proviso to section 1 (2) of the Law Reform (Frustrated Contracts) Act, 1943, still fails to make it abundantly clear to the beginner that expenses can only be retained or recovered out of money paid or payable before the frustrating event. The chapter on Quasi-Contract is as masterly as ever.

There are at least two welcome exclusions. The reviewer had long felt that Tweedledee's well-known dictum: "if it was so, it might be; and if it were so, it would be: but as it isn't, it ain't. That's logic" was the only printable comment that could be made on the decision in *Upton R.D.C. v. Powell* in 1942. The fire brigades have gone from this edition and are best forgotten. Section 79 of the Companies Act, 1948, which had unhappily

intruded into the passage on estoppel in the third edition, has also gone. Is it too much to ask that in the next edition the reference to *Wiles v. Maddison* [1943] 1 All E.R. 315 should be struck out? The conscientious reader sometimes obeys the footnote direction (p. 27) to see the remarks of Lord Caldecote—on goods in a shop window. To explain to him later that these remarks have nothing whatever to do with “offer” in its contractual sense is a boring and time wasting experience. It is ten years since Winfield objected to the case in his review of the first edition and mention of it after the *Boots* case seems pointless.

This edition is only a few pages longer and a few shillings more expensive than its predecessor: the publishers and printers have as always done an admirable job. May the reviewer conclude, as he has concluded before, by saying with respect that this is an excellent book?

F. J. ODGERS.

The Law of Civil Injuries. By HAMISH R. GRAY, LL.M., Solicitor, Lecturer in Law, University of Nottingham. [London: Hutchinson's University Library. 1955. 172 and (Table of Cases and Index) 19 pp. 8s. 6d. net.]

THE task of writing a textbook on the law of tort in about 2,000 pages would be a comparatively simple one. The task of writing a book on tort in about 170 pocket-size pages is an enormously difficult one. Mr. Gray is to be congratulated both on his courage and his achievement. After a dozen pages of Introduction he has divided his book into Torts Involving Personal Injuries, Torts Affecting the Enjoyment of Property, False Statements as Torts, Abuse of Legal Procedure and Interference with Legal Relationships, and General Conditions of Liability. As this is more or less the order of Professor Street's new textbook, the two Nottingham products will go very well together.

Occasionally, and inevitably, there are passages over which one hesitates, but always with sympathy for the author in his hard task of compressing without distorting. For instance, the passage on p. 43 about the Fatal Accidents Acts and the Law Reform Act, 1934, can be read as implying that the latter extended the former to cover dependants other than the deceased's immediate family; p. 72 suggests that the owner of a dog is only liable if it has *succeeded* in biting someone previously; on p. 88 the statement that, under section 4 of the Defamation Act, 1952, “the defendant may tender amends, that is, an offer of financial compensation, and offer a sufficient apology” is misleading; p. 145 overlooks the fact that exemplary damages are recoverable *against* the estate of a deceased wrongdoer. But the general soundness, accuracy and

comprehensiveness of so small a book are quite remarkable. Mr. Gray has produced a worthy addition to a first-class series. It is well arranged, clearly and convincingly written, and eminently readable.

F. J. ODGERS.

Forms of Roman Legislation. By DAVID DAUBE. [Oxford University Press. 1956. 111 pp. 21s. net.]

THIS book is the outcome of lectures given at University College, London, by the Regius Professor of Civil Law at Oxford on some problems of form criticism in Roman legislation. The volume is not large, being barely one hundred pages in length, and the author has confined himself to a comparatively few terse footnotes. There is no index.

Though the lectures are presented in an attractive, economical style, nevertheless this is not a book that can be read quickly. It demands a fair knowledge of the sources of Roman legislation and also of the syntax of Latin verbs. It deals with a question that is novel to many students of Roman Law, because it has surprisingly been almost completely neglected as a study, though many scholars have of course appreciated the significance of legal forms. Criticism of sources is well known to Roman lawyers. Such are the questions whether this or that fragment of the Digest is genuinely classical or comes from a post-classical editor or from Tribonian. Criticism of forms, on the other hand, examines various literary forms that have become stylised, with a view to discovering the significance and setting of these forms. Professor Daube points out in his introduction that, while "source criticism is indispensable for establishing the authorship of a work or its several parts, beyond that, for discovering the original function of an idea, its setting in life, form criticism is the method to employ." Indeed on some texts form criticism may prove superior to source criticism in its own field, and Professor Daube gives an example out of the New Testament versions of the beatitudes which carries complete conviction.

He then turns to the legal forms themselves. Chapter 2 deals with four questions selected at random to demonstrate the technique. The first is a comparison of the use of conditional clauses and relative clauses in legislative commands. "If a man murders another man, he shall be put to death" is the form contrasted with "Whoever murders a man shall be put to death." The first form is the more concrete and graphic; the latter is more abstract and general. The technique of this criticism may be seen in the following paragraph by the author:

"The different settings in life of the two forms become quite clear when we consider the different questions to which they make answer. The 'If'-form answers to the question: 'What shall be done in a certain emergency, if this or that happens, if a man murders another man?' Answer: 'In that emergency, if a man murders another man, he shall be put to death.' The relative clause presupposes a more advanced mode of asking: 'What shall be done to a certain class of persons, to him who murders?' Answer: 'That class, whoever murders a man, shall be put to death.' Here lies the reason why the old *lex Aquilia* begins, 'If anyone kills another's slave,' but a statute from the time of Augustus, 'Whoever damages a water-channel.' The story has become a category."

Then follows a commentary on the legislative substitute for the imperative of "*oportet, necesse est*, it is correct, needful." This leads on to a consideration of the sense of *oportere* and its significance in the formula. These pages, 14-23, are perhaps the most important for the general student of Roman Law, for the effect of rendering *oportere* not in the sense of "to be under a duty" but in that of "it is correct in view of the legal position" is to remove many difficulties. The chapter continues with a study of legislative forms combining or separating rule and sanction and of forms which speak of facts established as contrasted with facts alleged. In the latter instance, for example, we approach the line dividing legislation by statutes and *sec.* from the edicts of magistrates, "who did not directly legislate, attaching consequences to facts assumed to be established"; but they had power to declare which matters might be usefully raised before them and which might not. They were indeed concerned with tactics. Here was room, then, for the growing up of the form; "if so and so is alleged to have occurred—Whatever anyone is alleged to have lent—I shall give an action." On this matter of allegation p. 35 has another interesting digression on the formula, this time on the *demonstratio*.

By now the reader, a third of the way through, feels that the technique in the light of the numerous illustrations is a really effective key, and the remaining five chapters continue a fascinating series of operations in which the reader looks over Professor Daube's shoulder while he picks many different locks. To employ a more respectful metaphor, the reader will probably feel after a careful study of this work that Professor Daube has produced a sort of Rosetta stone for the full understanding of many of our texts.

Space precludes an account of all the resulting discoveries. Some forms, as the form *Ne quis fecisse velit* explained in Chapter 3, have exceedingly subtle nuances and some forms, as the forms of two *sec.* discussed in Chapter 5, are highly sophisticated. The structure of these *sec.*, the *Trebellianum* and *Macedonianum*, is tripartite in setting out the motives, measures and aims of the

Senate in that order. The preamble to an English Statute more naturally conflates the motives and intentions of the legislature, the reasons for reform and the objects of the measure, but this extraordinary Roman division, though it appears to have been too artificial to survive, yields some interesting results to Professor Daube's analysis. Finally, for those interested in legal history the chapter on the survival of forms in new settings has a peculiar interest. Every student knows that *sec.* were traditionally expressed in language of recommendation to the magistrates and this form "occurs even in the later Principate, when the senate does possess legislative power." But this is not the problem that Professor Daube has in mind. He is concerned to show that with forms transferred "from one domain to another, say, from statutes to *senatusconsults* or from expert advice to edicts, the original form is apt to survive. It follows, as a corollary of this proposition, that if a form is out of keeping with its present surroundings, this is frequently a sign of the material having originated in a different milieu." Examples are imperative language in *sec.* and *aedilician* edicts or the incorporation of expert advice as originally given into the *praetorian* edict.

Here we have arrived at a point where form criticism and source criticism meet and where we may leave with a parting thought on these two methods. Source criticism has been applied to the texts with extreme vigour for many years now and with great effect, but in this field it is easy to feel that the dead have often been slain more than once. It is to be hoped that form criticism will now be given its turn, for no advertisement of this pioneering tool could be more striking than the effects thus demonstrated in Professor Daube's hands.

DAVID YALE.

- A Guide to Compulsory Purchase and Compensation.* Third edition, by R. D. STEWART-BROWN, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1955. 112 and (index) 5 pp. 18s. 6d. net]
- An Outline of Planning Law.* 2nd edition, by DESMOND HEAP, LL.M., L.M.T.P.I. [London: Sweet & Maxwell, Ltd. 1955. xxxvi, 199 and (index) 5 pp. 25s. net.]
- Town and Country Planning Act, 1954.* By DESMOND HEAP, LL.M., L.M.T.P.I., [London: Sweet & Maxwell, Ltd. 1955. xv, 215 and (index) 18 pp. 25s. net.]
- The Town and Country Planning Act, 1954.* By DEREK WALKER-SMITH, LEWIS F. STURGE and ALISTAIR DAWSON. [London: Eyre & Spottiswoode (Publishers), Ltd. 1955. xx, 211 and (index) 10 pp. 40s. net.]

- Planning Compensation Valuations.* By W. F. OLIVER and K. F. GOODFELLOW. [London: Sweet & Maxwell, Ltd. 1955. xv, 308 and (index) 19 pp. 37s. 6d. net.]
- Planning. Compulsory Purchase and Rating Law.* By M. R. R. DAVIES, PH.D.(Cantab), LL.M.(Leeds), D.P.A.(London) [London: Butterworth & Co. (Publishers), Ltd. 1956. xlv, 293 and (index) 28 pp. 40s. net.]
- The Public Control of Land.* By J. F. GARNER LL.M. [London: Sweet & Maxwell, Ltd. 1956. xxiii, 196 and (index) 8 pp. 35s. net.]

THE number of books that have been written in recent years on planning, compulsory acquisition and allied topics is an indication of the great importance of these matters to lawyers. It would be so much simpler if one could just say that this is a specialised field that is of no concern to general practitioners. The trouble is that it is a specialised subject rapidly approaching that of income tax in its appearance of incomprehensibility, and yet, like income tax, it is a net that sweeps widely and will catch the unwary. The general practitioner simply cannot ignore these subjects, for even in the simplest of conveyancing, if he were to ignore these matters, he would get his client into trouble and probably have to make a heavy claim on his own indemnity policy.

At present there is a tendency to think of real property as being what it was in the decade following the 1925 Acts, the subject being crystallised in a Cheshire-ish form, and that all this terrible planning stuff is something that belongs to administrative lawyers and not to real property lawyers and conveyancers. To a large extent that is correct; a great deal of it is public law governing the way in which a local authority has to go about this part of its business, its relation with the Ministry and many other matters that do not directly impinge on private property rights. Matters of that kind can very well continue to lie outside the field of property law, but the whole business of development control, designation and other actual or potential control of the use of land can properly be called a part of real property law. The parallel with the growth of equity comes to mind, not in the sense of planning being a new equity (though that is a case that is arguable, for equity was never an unmixed blessing) but in its effect on thought and terminology. There was once "law" and the new intervention of equity which might rob a fee simple of what ought in law to be its essential quality. Now it is "law" (= law + equity) with new interventions and a fee simple becomes still more difficult to explain. One may own Blackacre and find that because of planning decisions and the intentions of some public authority the land is virtually useless and unsaleable. Whiteacre may, however, be just what it used to be; no public authority wants it and the planners are happy to let the

owner do what he wants to do. At present we describe both these interests in land as being a fee simple absolute in possession, and there is no convenient language for showing the difference in the content of the interests. Or take the tenant of agricultural land who is farming it properly; he has a security of tenure that is remarkable, for his landlord cannot turn him out unless an Agricultural Land Tribunal approves. Would it be wrong to suggest that such a tenant has a new kind of interest in land? I look forward to the time when someone will produce an exposition of the modern law of real property that is truly modern. It might of course look so horrid that nobody would want it.

The greatest need at present is, however, for practitioners to know the recent law, and naturally attention has gone to meeting this need rather than to attempt at recasting the traditional approach to the law of real property. All these books have been written so that the reader can cope with recent changes.

The first two are new editions of books that were successful as soon as they originally appeared. As simple introductions, Stewart-Brown to compulsory purchase, and Heap to planning law, they are in a class of their own. They are clear, accurate, well arranged and, within the limits of their size, comprehensive. Mr. Heap's book on the 1954 Act is of a different kind, consisting as it does of the text of the Act and of a number of the rules and regulations and a good commentary. It is essentially a work-book for those who know the earlier law and want to master the latest addition to the Statute Book. The book by Mr. Walker-Smith and his colleagues is of the same kind. If I had to choose between the two I should prefer Mr. Heap's as it is somewhat fuller and costs appreciably less. Mr. Oliver and Mr. Goodfellow have, as the title suggests, been primarily concerned with compensation valuations. One of the authors is a surveyor and the other is a lawyer; it also is a work-book, and a valuable tool for those who work in this field.

The remaining two books are of a somewhat different kind. The scope of Mr. Davies's book is substantially that of the optional paper in the solicitors' final examination and presumably it is the contents of that paper that has led to the inclusion of rating law. The result is that whilst the student has a single book that will doubtless be a godsend to him in dealing with that particular paper, there is a certain lack of unity, because apart from a common link of cases going to the Lands Tribunal, there is really very little connection between rating and the other subjects. Mr. Garner has taken the whole field of public control of land, that is to say, planning, building controls, housing, highways, public health and a large number of other matters of local and central government that may lead to limitations of use or to compulsory purchase. He is to be congratulated on setting out to do such a very difficult thing. The trouble is, of course, that in taking this very wide

field it is hardly possible to avoid saying something about everything and so not to have room for a full enough exposition of some of the vital points. On page 16, for instance, there is a paragraph on the meaning of "development" which really cannot help anyone. Yet if that and a number of other passages were expanded sufficiently the book would have run to excessive length.

It will be just too bad if Parliament goes and alters it all before we have really mastered the present plateful.

R. M. JACKSON.

Obscenity and the Law. By NORMAN ST. JOHN-STEVAS. With an Introduction by SIR ALAN P. HERBERT. [London: Secker & Warburg. 1956. xxii and 278 and (index) 11 pp. 25s. net.]

THOSE who heard or read Mr. St. John-Stevas's urbane, knowledgeable and perceptive Third Programme broadcast talks last year (particularly that on the Victorian conscience as exemplified in the literary history of the period) will have rubbed their eyes—if rubbing the eyes has not become obsolete through medical condemnation—on discovering that the author was an Assistant Lecturer in Law at King's College, London. It betokens no disrespect either to the class of Assistant Lecturers in Law in general, or to the sub-class of Assistant Lecturers in Law at King's College, London, in particular, to detect a certain incongruity between the office and the man. Let us say, at least, that Mr. Stevas is—or rather was, since he no longer belongs—the chiefest flower and ornament of his profession and status, of whom the honourable body of Assistant Lecturers in Law had reason to be proud.

The perfect field for a rare combination of legal attainment and literary culture was clearly the law of obscenity. Hence the present book. The copula in the title is important: it is almost as much a history of so-called obscenity as a disquisition on the law. But the survey of changing tastes and manners in literature has an important bearing on the law, because it indicates the type of literature against which the common-law crime and the Act of 1857 were originally directed, as well as the way in which the legal provisions have been used. All this part of the work is excellently done. When we come to the purely legal argument in Chapter 6, some reservations may be felt. The law of intention and recklessness as forms of *mens rea* is not very well or clearly explained to the general reader to whom the book is primarily addressed. The author argues that the crime of obscenity should be and indeed is limited to cases where the defendant intended to corrupt others, and produces an ingenious argument to circumvent the *Hicklin* judgment. Legal sabotage of an authority as obnoxious as the

Hicklin one may be condoned or even welcomed, but the author does not expressly recognise that his requirement of intent to corrupt would leave nothing of the law of obscenity. For no publisher of obscenity ever does intend to corrupt; usually he just intends to make money, or if he is the author he intends to attract attention or express his emotions. An intention—a real intention—to corrupt others exists only in the language of indictments.

The most that can be said is that a defendant may be reckless as to corruption; but even here the concept of corruption is so vague and disputable that one may question whether it could ever be genuinely established as an element in a criminal charge. When there are convictions for obscenity, they take place on the basis of a wholly fictitious intention. A much closer analysis of this question might have been expected in a work of serious legal purpose.

Mr. St. John-Stevas claims that his opinion as to the mental element in obscenity is supported by Fox's Libel Act; he should tell the reader that that Act contains not a word on the subject, and that its utmost relevance is that it brought about a change of spirit in the law of libel. The argument at this point suffers from an undue condensation of a passage in Stephen. The author then proceeds to quote a number of authorities as if they supported his opinion, whereas for the most part they contradict it. Starkie's opinion that equivalent to a malicious intention is "a state of apathy and indifference to the interests of society" seems to turn the offence into one of negligence; Mr. Justice Stable's "pursuing an honest purpose" is something different from an absence of intent to corrupt; and both Stephen's *Digest* and *De Montalk* look rather to the objective situation created than to the intent of the defendant.

Apart from his insistence upon the necessity for intent, Mr. Stevas's chief contribution to the legal aspect of the subject is in the distinction that he seems disposed to draw between obscenity and pornography. "A pornographic book, although obscene, is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac. An obscene book has no such immediate and dominant purpose, although incidentally this may be its effect" (p. 2). There is a logical flaw in these definitions; perhaps the word "has" should read "may have." For the most part the author expresses himself as against pornography: "the law is rightly used to suppress the social evil of pornography and to punish those who seek to benefit by its distribution" (p. 201). Yet at p. 196 we are told that there is little scientific evidence that pornographic books have an undesirable effect on sexual behaviour, and "it is at least as probable that it is sexual desire, especially if frustrated, that creates the taste for pornography and not pornography which stimulates sexual desire."

This is not the first book, nor will it be the last, in which the law reformer gets the better of the legal historian and analytical lawyer. But to concentrate upon technical legal flaws and a few defects of presentation is perhaps to give a false impression; as a history of social, literary and legal attitudes the book is far in front of anything that has been done either in the same field or in the kindred fields of defamation, blasphemy and obscenity.

GLANVILLE WILLIAMS.

American Constitutional Law. By BERNARD SCHWARTZ, Professor of Law and Director of the Institute of Comparative Law, New York University; with a foreword by A. L. GOODHART, K.B.E., Q.C. [Cambridge, at the University Press. 1955. xiv and 364 pp. 25s. net.]

PROFESSOR Schwartz comes as a missionary to expound the American Constitution for the special benefit of British readers, a task as generous as it is valuable. He is unusually well equipped for it by his comparative studies in administrative law, and he has given us a highly interesting and instructive book. It is no derogation to say that some people may finish it with the conclusion that, despite the radical differences of framework, English and American constitutional law have more problems in common than might have been supposed. The book falls into two halves, "The Structure" and "Modern Developments." The first of these contains, on the whole, little that will seem new and strange to cisatlantic readers who have any interest in American institutions; it serves rather as an anthology of quotations about general principles. But the second part of the book is fascinating, for here the author explains and discusses the burning issues of the present day, and in the U.S.A. great issues of public policy are so often legal problems. Lord Keynes once said, in a happy but not well chosen moment, that the Mayflower must have been filled with lawyers who had multiplied ever since. Certainly the American Constitution assigns to the Supreme Court the deciding voice in vital questions of the balance of powers within the State. Professor Schwartz well explains how responsibly the court discharges this virtually legislative function, and how (as a corollary) it takes a free hand in discarding its own previous decisions. Perhaps it is this exalted concept of the function of law which makes the author speak throughout of "jurists" where in England we would unashamedly say "lawyers."

Outstanding among the chapters on "modern developments" are those concerning the *Steel Seizure* case of 1952, with its seventeenth-century prerogative issue in modern dress; the Supreme Court, with its new-found policy of indulgence towards

federal statutes of questionable validity; and the treaty-making power, where the difficulties attendant upon the *Migratory Birds* case and the Bricker Amendment are treated under the rather inapposite title of "The United States and the United Nations." The peculiarly legal flavour of American public affairs is well brought out when we are told how matters of the highest political moment can turn upon the meaning of "the" as used in 1787 (pp. 191, 297) and upon the distinction between rights and privileges (pp. 266, 300).

Many will turn with expectation to the chapter on administrative law, but here limits of space result, perhaps necessarily, in a less satisfying chapter; or perhaps it is that America faces the same familiar dilemmas that are always with us in England, and in this department the American Constitution does not seem to provide keys to any of the puzzles. It strikes an English (and ignorant) reviewer as curious that, apart from one footnote, there is barely a reference here to the "due process" clause of the Fourteenth Amendment. Is it wrong, then, to suppose that this is a cornerstone of American administrative justice? The chapter of course contains much of interest, especially on judge-proof statutes, judicial review and jurisdictional fact. But as a whole it seems a little scrappy; even the account of the Federal Administrative Procedure Act of 1946 is hardly the analysis for which Dr. Goodhart whets our appetites in his foreword. Its twin, the Federal Tort Claims Act of 1946, is another major item which attains only a single footnote (and not in this chapter); but if *Dalehite v. United States*, 346 U.S. 15 (1953) is typical, there must be profound differences in the American law of "crown proceedings" in which comparison may possibly be to England's advantage. It is unreasonable to expect everything to be covered in a book of such wide scope, but here the author is upon his home ground.

It is a great advantage that Professor Schwartz is learned in English law. His comparative allusions are always of interest, but not invariably sound. The English law as to act of State, which operates only outside the jurisdiction and is therefore consistent with the domestic "rule of law," is not really comparable with the Supreme Court's doctrine of "political questions," which seems to deny protection to the rights of resident American citizens (pp. 153-157). Dicey's famous passage on the sovereign power in the United States ("a despot hard to rouse") is criticised on the radically wrong assumption that by the sovereign Dicey meant Congress, whereas in fact he meant the aggregate of powers which can amend the Constitution (p. 184). An exaggerated passage on *Liversidge v. Anderson* (with the point of issue not stated) cites it for "the complete preclusion of any judicial control over the legality of executive action," as if this were a general principle of English law (p. 205).

It ought to be said, with no intention of seeming ungracious to an American author who publishes so welcome a work in England, that Professor Schwartz over-indulges his weakness for quotation. This can become tiresome, for some of the quotations are commonplace and some do not justify the "eloquently" with which they are often introduced. A policy of quoting everything that is quotable (even from secondary sources) means that the best quotations lose their distinction in a general haze of inverted commas—one is reminded of Queen Victoria's underlining. There is also rather too much repetition, both of matter and of phrase. One learned authority is so often cited as "a distinguished American jurist" or "a leading American jurist" that the reader begins to feel like the Greeks who voted to banish Aristides, for weariness at hearing him always called "The Just."

But of course it is the substance of the work which is important, and Professor Schwartz may be assured that he has put a great many British readers in his debt by opening a special window for them on a deeply interesting subject which, without his help, they would be unable to understand. There was a real need for this book, and for it we may be truly grateful.

H. W. R. WADE.

Administrative Jurisdiction. By SIR CARLETON KEMP ALLEN, Q.C., M.C., D.C.L., F.B.A., J.P., of Lincoln's Inn, Fellow of University College, Oxford. [London: Stevens & Sons, Ltd. 1956. xv and 101 pp. 15s. net.]

As sweet follows meat, Sir Carleton Allen serves us this tasty *sorbet* after the diet of invaluable but indigestible memoranda provided by government departments to the Franks Committee. The dearth of material on administrative tribunals is now at last being made good, and the official memoranda cover the whole subject most conscientiously, from new towns down to bull and boar licensing ("the inspection of the animal is informal"; no provision is made for legal representation; "the need for cross-examination does not arise"). Sir Carleton Allen's work is an extended essay, taking the form of a general survey and commentary. He expressly disclaims the intention of undertaking a detailed account of all the various tribunals, which must (he thinks) be undertaken as a piece of team research on American lines. It is "only by crystallising the results of some such extensive survey over the whole of our widespread 'inferior' jurisdictions that we shall find the guiding principles for setting our administrative law upon a firm and rational basis." Perhaps we ought not to flinch even from this. But how agreeable is the personal touch with which Sir Carleton Allen manipulates this intractable subject. He is in his

happiest vein, meaning not that his work is a paean of praise, but that it is illuminated by delightful shafts of wit and wisdom. This time he has armed himself with the rapier rather than the scourge, and his thrusts, as well-directed as ever, lose none of their force from being delivered in the more delicate style.

This essay has been detached from the second edition of *Law and Orders*, for which it was intended until it grew out of hand. It has already appeared as the *pièce de résistance* in the notable first issue of *Public Law*, and since most people interested in the subject will have already read it there, there is no need for a full review of its substance. But attention may be drawn to the author's criticisms of the "tribunalism run mad" of the national health service, of national and industrial insurance, and of the unsatisfactory contrast between *R. v. Minister of Agriculture, ex p. Graham* [1955] 2 Q.B. 140 and its companion case *Ex p. Benney*. He does not say a great deal about the much-discussed shortcomings of public inquiries, though he considers a few of the leading cases. In case his statement (p. 90) that "in American administrative law it is a firm principle that he who hears should also decide" should arouse envious feelings, it ought to be added that the principle, so far from being firm, seems to be subject to exceptions which undermine it—see for example p. 294 of Professor Schwartz's book, reviewed above.

As he approaches the end the reader expectant to know what general reforms Sir Carleton Allen would advocate is disappointed on the final page to be told that space forbids. But there is also the welcome news that the learned author hopes to consider elsewhere the proposal to establish an administrative court of appeal. This is something to look forward to, and we may be sure that it will be no less a pleasure to read than the preliminary survey.

H. W. R. WADE.

The Law Of Bankers' Commercial Credits. By the late H. C. GUTTERIDGE, Q.C., LL.D. Second edition by MAURICE MEGRAH, of Gray's Inn, Barrister-at-Law, M.Com.(Lond.), Secretary to the Institute of Bankers. [London: Europa Publications, Ltd. 1955. xxiii, 168 and (Appendices and Index) 58 pp. 25s. net.]

WHEN the first edition of this work appeared in 1932, it was recognised as a pioneering venture in this field of mercantile law, where commercial practice, under the stimulus of the practical necessity of providing a mechanism to ensure payment to the exporter of goods to foreign countries, had advanced beyond the development

of legal doctrine. But Professor Gutteridge, with his wide knowledge, his analytical skill, and his lucidity of exposition, succeeded in breaking down the complicated commercial relationships which are often involved in such transactions and in presenting the legal issues and rules in easily comprehended terms; and it is a remarkable tribute to him that so little of the original text has had to be omitted or amended even after twenty-three years of considerable development in this field.

Professor Gutteridge also succeeded—and this is perhaps the crowning glory of the law teacher—in communicating his interests in the subject to his pupils, one of whom, Professor A. G. Davis, is the author of another standard legal textbook on Commercial Letters of Credit, and another of whom, Mr. Megrah, is the editor of this second edition of Professor Gutteridge's own book.

Originally Mr. Megrah was to have been the co-editor of this edition with the author himself, but unfortunately the death of Professor Gutteridge in December, 1953, prevented this and threw the whole work for the new edition on Mr. Megrah. However, few people were as well qualified for this task as Mr. Megrah, not only because of his close association with Professor Gutteridge, but also because of his own practical experience as Secretary of the Institute of Bankers; and this subject is so much a matter of commercial practice. Indeed, the influence of Mr. Megrah's practical experience is reflected throughout this new edition and has changed the character of the whole work from a comparatively brief exposition of the fundamental legal principles intended primarily for lawyers and law students, to a practical manual for bankers and exporters.

Thus, the main reason for the expansion of the text (from 103 pages to 168) is the inclusion in Chapter 5, "The Tender of Documents under Credit," of such new topics as Clean and Claused Bills of Lading, Stale Bills, Part Shipments, Refusal of Documents, Loss of Documents, Indemnities, and Ratification, all matters of considerable importance to a banker called upon to make payment under a credit. Of similar importance is the discussion of recourse by the intermediary banker to the beneficiary introduced into Chapter 4, although certain propositions put forward in connection with such recourse, in particular proposition (ii) on page 52, must surely reflect the opinion of the optimistic banker rather than that of the cautious lawyer.

Two new chapters replace a paragraph and a note, respectively, on the Transfer and Assignability of Credits, and on the Conflict of Laws; the original Appendix of specimen forms has been enlarged from 10 to 29 pages; and two new Appendices are included, one giving the text of the Uniform Customs and Practice for Commercial Documentary Credits—not adopted by British bankers—and the other giving a suggested glossary of terms and responsibilities in commercial credit transactions, reproduced from *The Banker*.

We see, then, that there is a great deal of new work in this edition—work on topics which are peculiarly within the sphere of Mr. Megrah's personal experience—and the text has in general been brought up to date and new cases noted. And so, with such a wealth of new material, and with the editor's lively treatment of the whole subject as being a matter of living law, the book makes very interesting reading and will prove of great value to all who have occasion to refer to it.

Yet, with all its qualities, this second edition has lost something—the simplicity and lucidity of the original text. The result is that now we quite often encounter an obscurity of expression which necessitates a careful re-reading of the text in order to be quite certain of the meaning; and for someone who is not previously well acquainted with the subject-matter certain new passages must make heavy going, partly because of the ever-increasing complexity of the transactions.

One source of difficulty could well be removed by a more severe pruning of the original text, namely the confusion surrounding the words “irrevocable” and “confirmed.” The distinction which is now generally drawn between these words is well stated on page 13, but other passages, e.g., on pages 34–35, still reflect the interchangeability previously accorded to these terms.

Again, in Chapter 3, “The Legal Aspects of a Contract created by the Issue of a Credit,” we find discussed that popular legal conundrum, the legal relationship, if any, between the issuing bank and the seller. The usual theories are set out and examined—the Offer and Acceptance theory (although without any reference to Professor Davis's criticism of the first edition on this point), the Guarantee theory, and so on—and then we come to the heading, Consideration. This could be misleading, since consideration, far from being another possible explanation of the relationship, is, of course, one of the major obstacles in the way of establishing the Offer and Acceptance theory. Actually, as the text reveals, the theory which Gutteridge offered as an alternative is one of Agency, “a buyer who at the instance of the seller, procures the issue of an irrevocable credit in favour of the seller may be deemed to act as the seller's agent for this purpose . . .” a theory which receives some indirect support from the *Pyrene Case* [1954] 2 Q.B. 402, where the buyer was deemed to act as the seller's agent in entering into that part of the contract of affreightment which related to the loading of the fire-tender.

But the most revolutionary, and yet perhaps the most potentially satisfying, theory which has recently been judicially expounded has not found a place in the book. This is the suggestion by Denning L.J. in *Trans Trust S.P.R.L. v. Danubian Trading Co., Ltd.* (1952), that, in issuing an irrevocable letter of credit, the issuing banker creates a chose in action in favour of the beneficiary.

It is true that this theory may eventually be found to produce more problems than it solves, but it ought certainly to be mentioned, especially as the more orthodox alternative of establishing an ordinary contractual relationship between the bank and the seller, which would enable the latter to sue the bank for a wrongful revocation of the credit before presentation of the documents, might also have the effect of giving the bank a right to sue the seller if he failed to present the documents, a remedy which presumably not even the most ardent advocate of bankers' rights would wish to claim.

C. F. PARKER.

The History of Negotiable Instruments in English Law. By J. MILNES HOLDEN, LL.B., PH.D., A.I.B., of Lincoln's Inn, Barrister-at-Law. [London: University of London, The Athlone Press. 1955. xxxix, 323 and (Appendices, Bibliography and Index) 27 pp., with 6 plates. 42s. net.]

THIS book, the author tells us in his Preface, is based on his thesis for the degree of Doctor of Philosophy in the University of London, and is "a modest attempt to fill the gap" which has existed in our legal and economic history for want of a comprehensive treatment of the development of Negotiable Instruments. Undoubtedly there has been such a gap and, equally undoubtedly, this book admirably fills it.

Dr. Holden is thoroughly versed in his subject, both as a lawyer and as a former member of the staff of one of the jointstock banks, and he possesses also a wide range of knowledge on allied economic and commercial topics. His style is lucid and straightforward, often forceful, with occasionally a picturesque turn of phrase and a touch of humour—as when he likens Lord Mansfield's reputed deficiencies in the technical details of the common law to Nelson's policy of not wanting to see what he knew to be there.

The combined effect of the author's enthusiasm for his subject, his complete mastery of detail, and his easy style, is to make the development of negotiable instruments in English law a living process, engendered by economic and commercial requirements and evolving in this setting of human activity as those requirements change. He concentrates mainly on the bill of exchange, the promissory note, the banknote, and the cheque, and succeeds in infusing life into that bony skeleton, the Bills of Exchange Act, 1882, because, with his aid, we appreciate that the rules in the Act are merely a precise statutory formulation of the principles enunciated by the courts during the previous century or so when faced by factual situations which had arisen in the course of social and commercial intercourse. And, as always in the study of Law, knowing the reason, we can better understand the rule.

So far as the actual plan of the work is concerned, the book is divided into four periods, 1200 to 1601, 1602 to 1710, 1710 to 1882, and 1882 to 1955. In the first two periods the author deals separately with the development of the bill of exchange and of the precursor of the promissory note, the writing obligatory. Naturally the material on which he has to work in the chapters on the first period is very limited, and it may be that some of his conclusions appear rather venturesome in view of the slender reports on which they are based. However, these conclusions are well reasoned and differing conclusions of other experts based on the same slender reports are confidently rejected.

By the beginning of the third period, 1710, it seems clear, as Dr. Holden tells us, that the foundations of the modern law of bills and notes had been laid, with the principle of negotiability recognised, and the rights and duties of the parties stated in some detail. The eighteenth century saw "the gradual elucidation by the courts of the manifold problems to which these instruments gave rise," while, in the nineteenth century, the decisions were "for the most part illustrations of and deductions from the general propositions which had already been laid down," and it is in these decisions particularly that we can see in embryo the future codifying statute.

It should be appreciated from these remarks that henceforth any intelligent study of the law of Bills and Notes will demand an acquaintance with this work, and this is especially true of the last two chapters which cover the last period from 1882 to the present day. In the first of these chapters, "Some Recent Developments," Dr. Holden describes *inter alia* the reason for, and the effect of, the few amending Acts passed since 1882, the enterprise known as the Cheque Bank, Ltd., which had a flourishing but brief existence at the end of the century, the experiment of the Midland Bank, Ltd., with its chequelettes in 1928, and the development of the "Account Payee" crossing, so studiously avoided by bankers in their advice to customers printed in the cheque-books.

In the last chapter, "The Old Order Changeth," the author quits his role as legal historian and assumes first that of the economist, discussing the severe decline in the years between the wars in the number of bills, in both home and foreign trade, the consequent change in the function of the discount market, and the remarkable increase in popularity of the cheque; and he then assumes the role of law reformer, suggesting several amendments to the 1882 Act (especially to section 82), the abolition of the requirement of endorsement when the payee is paying an order cheque into his own account for collection, and the introduction of a new form of non-transferable instrument which would take the place of the cheque in the ordinary settlement of accounts, for which function, oddly enough, the negotiability of a cheque, far from being of any use, is usually a potential source of danger.

All in all, therefore, this is a varied and highly valuable contribution to legal scholarship, made all the more acceptable by a pleasing production, some interesting plates of seventeenth-century instruments, and an excellent standard of accuracy of reference and cross-reference and of freedom from printers' errors, which so often mar a new book. Indeed, the only flaw that was detected was the omission of the final "d" of "indorsed" in the last line of the text on page 117!

The author is a fervent advocate of Chief Justice Holt as the true founder of English commercial law. The cause is one which may well be maintained, as Dr. Holden amply shows, but one feels that the cause is not advanced by an almost equally fervent attack on Lord Mansfield and on his supporters. Such partisanship easily degenerates into special pleading. The author is essentially a man of commerce, with a critical eye, and often scant respect, for the common law, yet he acquiesces readily enough in the demands of the common law for consideration as a technical requirement for the enforceability of bills, and feels called upon to defend Holt when the Chief Justice is alleged to have said that a bill is a specialty and therefore good without consideration. Of course, not being under seal, a bill cannot technically be a specialty in English law, but much could be said in favour of the Continental view that the obligation on a bill arises out of its nature and form, and this would have saved us from the task of trying to make it conform to general principles of Contract by stretching the doctrine of consideration almost to breaking point; and so even if Holt had advocated this, it is nothing of which Dr. Holden need feel ashamed.

C. F. PARKER.

Nationality and Statelessness in International Law. By P. WEIS, PH.D., DR.JUR. With a Foreword by HERSCH LAUTERPACHT, Judge of the International Court of Justice. [London: Stevens & Sons, Ltd. 1956. xxviii and 322 and (index) 16 pp. 63s. net.]

THIS is an important and useful book, gathering together in one volume the various aspects of nationality from the standpoint of international law. Although there exist isolated articles and essays in English on nationality questions, Judge Lauterpacht's claim, in the foreword to the book, that "this is the most comprehensive modern treatment of the law of nationality that has appeared so far in the English language" is just and well-merited.

Dr. Weis's book is divided into four Parts. Part I deals with the "conception of nationality." Here he develops the view that there exists a concept of nationality in international law which is independent of municipal law and which the latter cannot violate. He says (p. 7) that "its definitions" (those of municipal law)

"must be disregarded when the nationality status of an individual has to be determined for the purpose of international law by international tribunals." Later he says (p. 34) "Nationality as a term of international law cannot be defined in terms of municipal law." These are the most revolutionary statements in an otherwise conservative book. A general definition of nationality is one thing; but to assert that a concept of nationality exists in international law, which prevails over any municipal criterion, is another matter. Dr. Weis does not make out a convincing case in this respect. Writing of the "elements" which go up to constitute the concept of nationality in international law, Dr. Weis refers to the "element" of protection. Protection, however, would appear to be a consequence of nationality rather than an "element" in it. It is not even a necessary consequence, as we have now learnt from the *Nottebohm* case. The same applies to the "duty of admission," which Dr. Weis describes as "an inherent duty of states resulting from the conception of nationality." This part of the book, though well argued and well documented, contains some highly dubious doctrine.

Part II of the book is entitled "Municipal Law and International Law." This is, unfortunately, far too brief (some thirty pages). There is perhaps an excessive, not to say unfortunate, reliance on Oppenheim, where the subject cannot be said to be exhaustively treated. It is a pity this part of the book is not more elaborate. The *Schwarzkopf* case, which is briefly noticed in Part III of the book, finds no mention here, though, in connection with the subject-matter, one might reasonably expect it to be quite fully discussed.

Part III is the longest (about 130 pages) part of the work. It is very well thought out and well written, for Dr. Weis cannot be charged with any lack of lucidity. It is entitled "The Public International Law of Nationality." Doubtless it is this section of the work that Judge Lauterpacht had specially in mind when writing his encomium. Certainly it is the most thorough portion of the entire work. The author first discusses what principles of international law regulate the conferment or loss of nationality. He rejects, it is believed rightly, the view that the *jus soli* and *jus sanguinis* are mutually exclusive principles of international law; they are, he says, simply grounds or titles for the original acquisition of nationality recognised by international practice. For the same reason he argues that prolonged residence, although a normal ground for the acquisition of nationality by naturalisation, is not essential for that purpose. On the subject of loss of nationality the author's view is that there is a duty on the part of a State to admit its denationalised nationals, but that this duty exists only if the denationalisation takes place when the person concerned was outside the frontiers of the State. This view is supported by many writers of high repute, but it may be doubted whether it

is truly part of international law. Nor does it seem that the qualification is a necessary or just one, since the fact that a national has been deprived of his nationality, whilst in his native country, does not appear to give any greater claim, on the part of the State, to exclude him than if he has been denationalised whilst abroad. Some rather more careful thinking has to be done on this problem. In general, however, one can only register one's approbation and respect for the author's prudent and balanced judgment on the question of loss of nationality, which is admirably summarised in the following pregnant sentences:—"Neither the view that denationalisation is inconsistent with international law because it creates statelessness nor the view that it encroaches upon the rights of the individual finds support in international law. Statelessness is not inadmissible under international law—though it may be considered undesirable" (p. 128). The author then proceeds to deal with the effect of territorial transfers on nationality. Here he is not altogether happy in his method, though admittedly it is the result of his own precise and systematic approach. He adopts the terminology of "partial" and "universal" succession, which it seems desirable to avoid. He says there is no automatic succession when one State's territory is involuntarily acquired by another. It is believed this is correct in law, but the inferences on which this is based have no necessary connection with State Succession. The remaining chapters of Part III deal with plural nationality, and with the proof of nationality, with particular reference to the practice of international tribunals. His indebtedness to the work of earlier writers in connection with the latter topic is evident, but the subject nevertheless receives originality of treatment and a fresh and lucid exposition.

The last and fourth part of the book contains a general discussion of the present state of the law, and of the lines upon which future developments might profitably take place. Like the rest of the book, what the author says here is sane and well-balanced. There is a valuable bibliography, and the text of relevant international conventions, and draft conventions, are included in appendixes. This is an important, useful, and scholarly work which no student of this branch of international law can afford to neglect.

J. MERVYN JONES.

The British Commonwealth Series—Vol. 4. New Zealand. Under the General Editorship of J. L. ROBSON, LL.M., PH.D. [London: Stevens & Sons, Ltd. 1954. xix and 373 and (index) 10 pp. £2 10s. net.]

FOR many reasons, New Zealand is of special interest to the student of politics, sociology and law reform. Her scattered early settlements and the presence of the Maori people required from the outset

some modification of English views and practice. Being a young country, she has been able, too, to break away from traditional institutions and procedures more readily than would be possible in older societies. And in certain fields New Zealand has been the scene of considerable political experiment—for example, in the enfranchisement of women, the welfare state, compulsory trade unionism and industrial conciliation and arbitration, and the abolition of an Upper House.

Volume 4 of this series surveys broadly the whole of the modifications of English law which have been made in New Zealand. Written by New Zealanders, it gives first-hand treatment of each subject; and an effort has been made to give a comprehensive view of the law as a whole and at the same time to give prominence to the more novel features. In such a book, what to stress is naturally a matter of choice, but one wonders whether it might have been better in some places to treat the subject in broader outline rather than give brief epitomes of successive statutes; certainly some experimental legislation and temporary measures now spent or not in practice invoked, might profitably have been curtailed. The succession of early courts, for example, is hardly even of real historical interest; price-control legislation has declined in importance; and few New Zealand lawyers would consider the "monopolies" measures a real force today.

On the other hand, few would complain had more space been given to the working of compulsory unionism and arbitration in practice. And the happy relations which exist between the European and Maori peoples—the envy of most other multi-racial countries—deserve much more generous treatment. Apart from the mention in the historical section of Sir George Grey's early policy, the Maori Land Acts and Maori Affairs are given scant reference, and rather undue stress is laid on some difficulties less successfully dealt with but comparatively trivial in nature.

Finally, warm tribute must be paid to a masterly review by Professor Campbell of the criminal Code and its working in practice—a chapter worthy of study by every English criminal lawyer—and to a frank and interesting discussion in the final chapters of weaknesses in the existing law. This could be read with advantage by New Zealand's own lawyers and statesmen.

L. SEALY.

Books also received include the following:—

- BONIFACIO, F., *Studie sul Processor Formulare Romanu*. 1—*Translatio Iudicii*. [Napoli. Edizioni Jovene. 1956. N.P.]
- CARLSTON, K. S., *Law and Structures of Social Action*. [Stevens & Sons, Ltd. 1956. 35s.]

- DELANY, V. T. H., *The Law Relating to Charities in Ireland*. [Alex Thom & Co., Ltd. 60s.]
- LANSDOWN, C. W., VAN DER RIET, E. F., & DOCK, G. N., *Judicial Interpretation of the South African Criminal Procedure Acts (1917-1955)*. [Sweet & Maxwell, Ltd. 1956. £5 14s.]
- Laws Concerning the Nationality of Ships*. [London: H.M. Stationery Office. 1956. 11s.]
- MORGAN, E. M., *Some Problems of Proof under the Anglo-American System of Litigation*. [Oxford University Press. 1956. 28s.]

New editions:—

- CLARKE HALL & MORRISON'S *Law relating to Children & Young Persons*. 5th edition. [Butterworth & Co., Ltd. 1956. 90s.]
- Current Legal Problems 1956*. [Stevens & Sons, Ltd. 1956. 32s. 6d.]
- KAHN-FREUND, O., *The Law of Inland Transport*. 3rd edition. [Stevens & Sons, Ltd. 1956. 35s.]
- KIRALFY, A. K. R., *The English Legal System*. 2nd edition. [Sweet & Maxwell, Ltd. 1956. 30s.]
- NOKES, G. D., *An Introduction to Evidence*. 2nd edition. [Sweet & Maxwell, Ltd. 37s. 6d.]
- Slater's Mercantile Law*. 13th edition. [Sir Isaac Pitman & Sons, Ltd. 1956. 30s.]
- WILLE, G., *Principles of South African Law*. 4th edition. [Sweet & Maxwell, Ltd. 1956. 66s.]
- WILLE, G., *Landlord and Tenant in South Africa*. 5th edition. [Sweet & Maxwell, Ltd. 1956. 63s.]

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